No. 10254

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

SEATTLE-FIRST NATIONAL BANK, a national banking association,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

ROTARY COLORPRINT, 880 FOLSOM ST., SAN FRANCISCO 50-10-8-48

INDEX

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

	Page
Answer	7
Appeal:	
Certificate of Clerk to Transcript of Record on	87
Designation of Parts of the Record to Be Printed in the Record on	90
Designation of Portions of Record to Constitute Record on (DC)	85
Notice of	83
Statement of Points to Be Relied Upon on (DC)	84
Statement of Points Upon Which Appellant Intends to Rely (CCA)	88
Certificate of Clerk to Transcript of Record	87
Complaint	2
Conclusions of Law	80
Designation of Parts of the Record to Be Printed in the Record on Appeal (CCA)	90
Designation of Portions of Record to Constitute Record on Appeal (DC)	85

Page

Exhibits for Plaintiffs:

A—Approval of Consolidation by Comptroller 16

B—Letter 1/25/37 re $500.00 Tax on Real Estate Transfer 19

C—Letter 1/25/37 re $457.60 Tax on Bond Transfer 21

D—Minutes, Board of Directors of Spokane & Eastern of 11/26/35..... 23

E—Minutes, Board of Directors of Spokane & Eastern of 12/24/35..... 38

Findings of Fact and Conclusions of Law..... 76

Judgment 82

Minutes of Trial..... 54

Names and Addresses of Attorneys..... 1

Notice of Appeal..... 83

Opinion of the Court..... 55

Order, Pre-Trial, Dated 3/12/42..... 11

Order, Pre-Trial, Dated 4/1/42..... 12

Statement of Points to Be Relied Upon on Appeal (DC) 84

Statement of Points Upon Which Appellant Intends to Rely (CCA)..... 88

Trial, Record of..... 54

	Page
Proceedings in U. S. C. C. A. Ninth Circuit	92
Order of submission	92
Order directing filing of opinion and judgment	92
Opinion, Healy, J.	93
Judgment	94
Order staying issuance of mandate	95
Clerk's certificate	95
Order allowing certiorari	97

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

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In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 218

SEATTLE-FIRST NATIONAL BANK, a national banking association,

Plaintiff,

v.

UNITED STATES OF AMERICA,

Defendant.

COMPLAINT

1. The plaintiff brings this action against the United States pursuant to the provisions of Section 1122(c) of the Revenue Act of 1926 amending paragraph twenty of section 24 of the Judicial Code, U. S. C. A. Title 28, Sec. 41(20).

2. Prior to December 28, 1935, the First National Bank of Seattle was a national banking association duly formed under the provisions of The National Bank Act.

3. The Spokane and Eastern Trust Company was a state bank and trust company organized and existing under the laws of the State of Washington. As a trust company it held in trust for certain beneficiaries certain bonds and stocks, the legal title to which was vested in it as trustee, executor, administrator, guardian or in other fiduciary capacities.

4. As a state bank the said Spokane and Eastern Trust Company likewise held certain real estate, including its banking premises and certain bonds and other securities, to all of which real estate, bonds and securities it held the legal title as a part of its corporate assets.

5. On December 28, 1935, pursuant to Sec. 331, Chapter 614, of the Act of August 23, 1935, U. S. C. A. Title 12, Sec. 34a, the First National Bank of Seattle and the Spokane and Eastern Trust Company consolidated, becoming, pursuant to such consolidation, Seattle-First [1*] National Bank, a national banking association, plaintiff herein.

6. Pursuant to this consolidation the corporate existence of each of the constituent banks participating in the consolidation was merged into and continued in the consolidated national banking association resulting therefrom, Seattle-First National Bank, and all the rights of the Spokane and Eastern Trust Company in the real estate and stock and bonds owned by it, the title to which it held as a part of its corporate assets, were, pursuant to said section of The National Bank Act, deemed to be transferred to and vested in the consolidated national banking association without any deed or other transfer, and the said Seattle-First National Bank became the owner thereof solely by operation of law. Likewise the consolidated national banking association, plaintiff herein, by virtue of such consolidation and without any order or other action on the

*Page numbering appearing at foot of page of original certified Transcript of Record.

part of any court or otherwise, became entitled to hold and enjoy the same and all rights of property as trustee, executor, administrator, guardian or other fiduciary as the Spokane and Eastern Trust Company held at the time of the consolidation, and the legal title to the said assets held by the Spokane and Eastern Trust Company, in trust as aforesaid, passed to the plaintiff herein by virtue of said consolidation solely by operation of law.

7. Thereafter the Treasury Department of the United States, through its Internal Revenue Service, made an examination of the assets held by the plaintiff as trustee, executor, administrator, guardian and in other fiduciary capacities which had formerly been held by the Spokane and Eastern Trust Company in a like capacity and of the real estate and other assets owned by the plaintiff which were formerly owned by the Spokane and Eastern Trust Company and asserted that the plaintiff as trustee had acquired the said assets held in the said trust accounts by a transfer taxable under the Revenue Acts of the United States and required the plaintiff to pay on account of said trust assets the sum of $673.88 by purchasing [2] and affixing to the various stocks and bonds and other instruments held as trust assets stamps in the said total amount, and the plaintiff did pay the said amount by purchasing said stamps and affixing the same to the said instruments. The Treasury Department of the United States likewise asserted that the plaintiff had acquired the real estate and banking premises, together with the bonds and other securities held

by it, as owned assets by a transfer taxable under the Revenue Acts of the United States and required the plaintiff to pay on account of said owned assets the sum of $1,057.60, consisting of a transfer tax upon the real estate and banking premises of $500, upon the bonds and securities of $457.60 and of a penalty in the sum of $100 by purchasing and affixing to the various records or instruments stamps in the said total amount of $957.60 and by paying the penalty of $100, and the plaintiff did pay the said amount by purchasing said stamps and affixing the same to the said instruments and paying the said penalty.

8. Payment of the said transfer taxes and penalty was made January 25, 1937.

9. On March 23, 1939, plaintiff filed a claim for refund of the said stamp taxes assessed upon the asserted transfer of the assets held by plaintiff in the trust accounts in the total sum of $673.88, together with interest thereon from the date of payment, January 25, 1937, and filed a further claim for the refund of the stamp taxes assessed upon the asserted transfer of the real estate, banking premises and other owned assets held by the plaintiff as owned assets in the total sum of $957.60, together with a refund of the penalty in the sum of $100 assessed and collected, together with interest thereon from date of payment, January 25, 1937.

10. On December 23, 1940, the said claims in the respective amounts of $673.88, together with interest thereon, and in the sum of $957.60, together with the penalty in the sum of $100, together with interest thereon, were rejected and refused. [3]

11. By reason of the premises the Treasury Department of the United States, through its Internal Revenue Service, has erroneously and illegally assessed and collected Internal Revenue taxes from the plaintiff, and has collected a penalty without authority of law, and the plaintiff is now entitled to recover the respective sums of $673.88, together with interest thereon from January 25, 1937, and the sum of $957.60, together with the penalty in the sum of $100, together with interest thereon from January 25, 1937.

Wherefore plaintiff demands judgment against the defendant, United States of America, in the sum of $1,631.48, together with the sum of $100, together with interest thereon from the date of payment thereof.

ARNOLD L. GRAVES
GRAVES, KIZER & GRAVES
Attorneys for Plaintiff
Post Office Address:
1224 Old National Bank Building
Spokane, Washington

(Duly verified.)

[Endorsed]: Filed Oct. 17, 1941. [4]

[Title of District Court and Cause.]

ANSWER

Comes now the defendant United States of America, by Lyle Keith, United States Attorney for the Eastern District of Washington, and for answer to the complaint of the plaintiff herein, admits, denies and alleges as follows:

I.

For answer to paragraph 1 of the complaint, defendant admits the same.

II.

For answer to paragraph 2 of the complaint, defendant admits the same.

III.

For answer to paragraph 3 of the complaint, defendant admits the same.

IV.

For answer to paragraph 4 of the complaint, defendant admits the same.

V.

For answer to paragraph 5 of the complaint, defendant alleges that the Spokane and Eastern Trust Company was merged into the First National Bank of Seattle, under the corporate name Seattle-First National Bank, the plaintiff herein, and that such merger or consolidation was authorized by Section 34(a), Title 12, of the United States Code; that the

merger or consolidation was accomplished by a written agreement therefor entered into between the directors of each [5] of the banks under date of November 26, 1935, subject to approval and ratification by the shareholders and Comptroller of the Currency; that on or about December 24, 1935 all of the shareholders of the Trust Company met and ratified the agreement of merger and consolidation; that thereafter the Acting Comptroller of the Currency on December 28, 1935 certified that the directors and shareholders of both of the banks had complied with the Act approved November 7, 1918, as amended, and the banks had become consolidated and such consolidation was approved by said Comptroller on December 28, 1935. Except as thus admitted, qualified or explained, all allegations, matters and things contained in paragraph 5 of the complaint are denied.

VI.

For answer to paragraph 6 of the complaint, defendant alleges that the corporate existence of the Spokane and Eastern Trust Company was merged into the plaintiff and that the corporate bonds, stocks and realty to which the former held legal title in its individual and in fiduciary capacities were delivered and transferred, together with legal title thereto, to plaintiff in connection with the merger or consolidation of the two banking corporations; that this transfer of legal title did not occur solely or wholly by operation of law but as

a result of voluntary action initiated and undertaken by the directors and stockholders of each of the banks, as set forth above in answer to paragraph 5 of the complaint. Except as thus admitted, qualified or explained, all allegations, matters and things contained in paragraph 6 of the complaint are denied.

VII.

For answer to paragraph 7 of the complaint, defendant admits that an examination was made of plaintiff's assets following the merger or consolidation and that as a result, plaintiff was required to and did affix and cancel documentary stamps in the aggregate amount of $1,631.48 with respect to the transfer from the Spokane and Eastern Trust Company to plaintiff of the former's real estate holdings and [6] corporate stocks and bonds held by it in its individual and various trust capacities prior to said merger or consolidation. Defendant states that subsequent to January 25, 1937, plaintiff tendered as an offer in compromise of the criminal liability incurred under Section 802 of the Revenue Act of 1926 the sum of $100.00, which amount was accepted. Except as thus admitted, qualified or explained, all allegations, matters and things contained in paragraph 7 of the complaint are denied.

VIII.

For answer to paragraph 8 of the complaint, defendant admits that documentary stamps in the amount of $1,631.48 were affixed upon the necessary

records or documents, and cancelled on or about January 25, 1937. Except as thus admitted, qualified or explained, all allegations, matters and things contained in paragraph 8 of the complaint are denied.

IX.

For answer to paragraph 9 of the complaint, defendant admits that plaintiff filed claims for the refund of $673.88 and $957.60, plus an alleged penalty of $100.00 and interest, but states that said claims were filed on March 25, 1939 and not on March 23, 1939, as alleged by plaintiff. Defendant also denies that the amounts were assessed. Defendant states that plaintiff purchased stamps and in that manner paid the documentary stamp tax. Except as thus admitted, qualified or explained, all allegations, matters and things contained in paragraph 9 of the complaint are denied.

X.

For answer to paragraph 10 of the complaint, defendant admits the allegations therein contained, save and except that defendant denies that the amount of $100.00 represented a penalty but, as hereinbefore alleged, defendant states it was an amount paid in compromise of plaintiff's criminal liablity under Section 802 of the Revenue Act of 1926, incurred as a result of failure to affix the necessary stamps. [7]

XI.

For answer to paragraph 11 of the complaint, defendant denies that the taxes in question have

been erroneously or illegally assessed or collected, and denies that plaintiff is entitled to recover the sums set forth in paragraph 11 of the complaint, or any part thereof: Further answering said paragraph 11 of the complaint, defendant denies that the defendant is indebted to the plaintiff in any amount whatsoever.

Wherefore, defendant prays that the action be dismissed, and that the defendant recover its costs and disbursements herein.

LYLE KEITH
United States Attorney

Copy received this 28 day of February, 1942.
GRAVES, KIZER & GRAVES
Attorneys for Plaintiff.

[Endorsed]: Filed Feb. 28, 1942. [8]

[Title of District Court and Cause.]

PRE-TRIAL ORDER UNDER RULE 16

To Graves, Kizer & Graves, Attorneys for Plaintiff:

To Lyle Keith, Attorney for Defendant:

By virtue of the Pre-trial Rule 16 of the Rules of Civil Procedure for the District Courts of the United States, you are hereby directed to appear before the undersigned Judge of the above entitled Court on Tuesday, March 24, 1942, at nine-thirty o'clock A. M., in the Judge's Chambers, in the Post Office Building at Spokane, Washington, to consider:

(1) The simplification of the issues.

(2) The necessity or desirability of amendments to the pleadings.

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof.

(4) The limitation of expert witnesses.

(5) Such other matters as may be of aid in the disposition of the action.

The clerk of this Court is directed to forthwith serve this order upon the above named parties by mailing a copy thereof to their attorneys at the address disclosed by the record herein.

Dated this 12 day of March, 1942.

L. B. SCHWELLENBACH
United States District Judge

Copy received Mar. 14, 1942.

[Endorsed]: Filed Mar. 12, 1942. [9]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

This cause duly came on for pre-trial hearing on March 25, 1942, before the undersigned judge of the above-entitled court pursuant to Rule 16 of Rules of Civil Procedure for the District Court of the United States; Graves, Kizer & Graves appearing as attorneys for plaintiff and Harvey Erickson, Assistant United States Attorney, appearing as attorney for defendant; and the court having examined the pleadings and having considered the

same and having heard the statements for both parties herein;

Now, Therefore, the court does hereby find as follows:

That on or about November 26, 1935, a written agreement was entered into by the First National Bank of Seattle and the Spokane and Eastern Trust Company, Spokane, Washington, signed by the directors of each, providing for the consolidation of the two banks under the corporate name of the Seattle-First National Bank, a national banking association, by the consolidation of the trust company and First National Bank of Seattle pursuant to Title 12, Section 34(a), USCA. This agreement contained a provision that it was made subject to ratification and approval by the stockholders.

That under date of November 26, 1935, the directors of the trust company published notice of a special meeting to be held to consider and determine whether the foregoing agreement should be ratified and confirmed and that on December 24, 1935, a special stockholders' meeting was held and all of the outstanding shares of the trust company were [10] represented in person or by proxy. It was unanimously resolved at this meeting that the agreement entered into between the directors of the two banks should be ratified and confirmed in that the consolidation should become effective upon approval thereof by the Controller of the Currency. The minutes recite that the secretary presented a waiver signed by all of the stockholders with respect to this meeting held December 24, 1935. On

December 28, 1935, Acting Controller of the Currency Awalt issued a certificate of approval wherein it was recited that it appeared that the directors and shareholders of both banks had complied with the Act of Congress approved November 7, 1918, as amended, and therefore the two banks had been consolidated under the charter of the First National Bank of Seattle and under the corporate title of the Seattle-First National Bank with an authorized capital of $8,000,000.

That the foregoing proceedings were authorized by Section 34 (a), Title 12, USCA, and resulted in the consolidation of the trust company into the plaintiff Seattle-First National Bank pursuant to the above statute, and accordingly there was effected by the agreement of November 26, 1935, and the shareholders' ratification thereof, followed by approval of the Controller of the Currency, a transfer of legal title to all corporate securities and real estate, legal title to which was formerly held in the name of the Spokane and Eastern Trust Company, either in its individual capacity or as a fiduciary in various capacities. No documentary stamps were purchased or affixed with respect to the transfer of legal title to such corporate securities and realty. Subsequently, a deputy collector examined the records of the bank, and as a result, documentary stamps in the amount of $1,631.48 were purchased and affixed to the appropriate records.

That the stamps were affixed and canceled on or about January 25, 1937, and thereafter the amount of $100.00 was tendered as an offer in compromise

of the criminal liability incurred under Section 802 of the Revenue Act of 1926 as a result of failure in the first instance to pay the aforesaid tax. [11]

On March 25, 1939, two claims for refund were filed—one in the amount of $673.88 and the other in the amount of $1,057.60, the latter amount comprising $957.60 tax and $100.00 as an alleged penalty. Interest is also claimed on these amounts.

It is further ordered that the plaintiff produce the original minutes of the Spokane and Eastern Trust Company of November 26, 1935, in which the directors of the Spokane and Eastern Trust Company entered into an agreement providing for the consolidation of the two banks under the corporate name of the Seattle-First National Bank and that the plaintiff shall also produce the original minutes of the meeting of the shareholders or stockholders taking place on December 24, 1935, in which it was unanimously resolved by the stockholders that the action taken by the directors should be ratified and confirmed.

Done in open court this 1st day of April, 1942.

L. B. SCHWELLENBACH
District Judge

Approved:

LYLE KEITH
HARVEY ERICKSON
Attorneys for Plaintiff
GRAVES, KIZER & GRAVES
Attorney for Defendant

[Endorsed]: Filed April 1, 1942. [12]

PLAINTIFF'S EXHIBIT "A"

C

Form 1924

Comptroller of the Currency
Organization Division
Charter No. 11280

Consol. No. 536

TREASURY DEPARTMENT
BUREAU OF THE COMPTROLLER
OF THE CURRENCY

Washington, D. C.,
December 28, 1935

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the directors and shareholders of First National Bank of Seattle, located in the City of Seattle, in the County of King and State of Washington, and the directors and shareholders of Spokane and Eastern Trust Company, located in the City of Spokane, in the County of Spokane and State of Washington, have complied with all the provisions of an Act of Congress entitled "An Act to provide for the consolidation of National Banking Associations," approved November 7, 1918, as amended.

Now, Therefore, I, F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that First National Bank of Seattle and Spokane and Eastern Trust Company have been consolidated under

the charter of First National Bank of Seattle and under the corporate title of "Seattle-First National Bank," with capital stock of Eight Million Dollars ($8,000,000), and that the consolidation is hereby approved. On the date of consolidation, the consolidated bank has two (2) branches, both located in the City of Seattle, which were branches of First National Bank of Seattle and which were in lawful operation on February 25, 1927.

In Testimony Whereof, witness my hand and Seal of Office this 28th day of December, 1935.

[Seal] F. G. AWALT,
Acting Comptroller of the Currency

HMV TBB

Treasury Department
Office of the
Comptroller of the Currency—ss.

Under the provisions of Section 884 of the Revised Statutes of the United States, I, F. G. Awalt, Acting Comptroller of the Currency, do hereby certify that the foregoing is a true and complete copy of the original certificate of F. G. Awalt, Acting Comptroller of the Currency, approving on December 28, 1935, under the Act of November 7, 1918, as amended, the consolidation of First National Bank of Seattle (Charter No. 11280), Seattle, Washington, and the Spokane and Eastern Trust Company, Spokane, Washington, under the charter of First National Bank of Seattle (Charter No.

11280) and under the corporate title of "Seattle-First National Bank," and of the whole of such original on file and of record in this office.

In Testimony Whereof, I have hereunto subscribed my name and caused my seal of office to be affixed to these presents at the Treasury Department, in the City of Washington and District of Columbia, this 29th day of January, A. D. 1936.

[Seal] F. G. AWALT
Acting Comptroller of the Currency

MP HMV [13]

PLAINTIFF'S EXHIBIT B

TREASURY DEPARTMENT

Internal Revenue Service

Office of Deputy Collector
District: Washington

Spokane, Washington
1/25/37

1/25/37
Earl E. Reed
Claim for Refund
Filed
11/26/40
[Stamp] E. E. REED
Dep. Coll.

Spokane and Eastern
Branch First National Bank of Seattle
Spokane, Washington.

Sirs:

Find affixed and canceled hereto documentary stamps in the amount of Five Hundred Dollars ($500.00) found due as the result of my recent examination of your records.

Tax liability was occasioned by the merger of the Spokane Eastern Trust Company and the First National Bank of Seattle on 12/28/35. As a result of such merger the assets of the Spokane Eastern Trust Company through the plan of merger became the property of the continuing corporation the First National Bank of Seattle. Included in the many assets was certain realty consisting of the

Bank building and the land there under the property of the Spokane Eastern Trust Company. The value of this property for the purpose of the merger was $500,000.00, this being the figure used establishes the value for tax purposes as being the actual consideration accordingly a tax liability of $500.00 was created.

Stamps in the amount of $500.00 have been affixed and canceled to this letter by me covering such liability in view of the fact that no warranty deed was issued.

This letter with stamps affixed should be made a part of your records for your protection and for reference in the future if necessary.

Respectfully
EARL E. REED
Deputy Collector
EARL E. REED
Dep. Coll. [14]

PLAINTIFF'S EXHIBIT "C"

TREASURY DEPARTMENT

Internal Revenue Service

Office of Deputy Collector
District:
Washington
Spokane, Washington
1/25/37

1/25/37
E. E. R.
D. C.
Claim for refund filed
11/26/40
[4 stamps] E. E. REED
Dep. Coll.

Spokane and Eastern
Branch—First National Bank of Seattle
Spokane, Washington

Sirs:

Find affixed and canceled hereto documentary stamps in the amount of $457.60.

The tax liability was created as the result of the merger, 12/28/35 between the Spokane Eastern Trust Company and the First National Bank of Seattle whereby certain taxable securities were taken over by the continuing bank. These securities were formerly part of the assets of the Spokane Eastern Trust Company.

This letter with stamps affixed should be retained

as a part of your records for your protection and for future reference if necessary.

Respectfully,

EARL E. REED
Deputy Collector

1/25/37
E. E. Reed
D. C.
Claim for refund filed
11/26/40
[7 stamps] EARL E. REED
D. C. [15]

Taxable Bonds *Effected* by the merger 12/28/35 between the Spokane Eastern Trust Company and the First National Bank of Seattle.

25000	Southern Pacific Co.	$ 10.00
20000	Anaconda Copper Mining Co.	8.00
15000	Armour and Co. of Delaware	6.00
25000	Baltimore and Ohio Ry.	10.00
10000	Bethlehem Steel Corpn.	4.00
5500	Catholic Bishop of Spokane	2.20
10500	Cathedral of St. John The Evang.	4.20
2500	Columbia River Longview Bridge	1.00
11500	Columbia Valley Inv. Co.	4.60
10000	Consumers Power Company	4.00
77500	Davenport Hotel	30.00
10000	Edison Elec. Illuminating Co.	4.00
500	Eugene Lumber Co.	.20
20000	Fox West Coast Theatres	8.00
50000	Great Northern Ry.	20.00
11000	Idaho Memorial Bldg. Assn.	4.40
12000	Idaho Memorial Bldg. Assn.	4.80
12000	Idaho Memorial Bldg. Assn.	4.80
20000	Kresge Foundation Notes	8.00

30000	Los Angeles Gas & Electric Corpn	12.00
8500	Montana Catholic Missions	3.40
25000	New York Central Ry	10.00
8500	Northwest Cities Gas Co	3.40
10000	Ohio Edison Company	4.00
25000	Olympic Forest Products Inc	10.00
25000	Olympic Forest Products Inc	10.00
25000	Olympic Forest Products Inc	10.00
25000	Olympic Forest Products Inc	10.00
11000	Oregon Washington Water Service	4.40
5000	Pacific Gas & Electric Corp	2.00
40000	Pacific Lighting Corporation	16.00
50000	Penn. Ry. Equipment Trust	20.00
50000	Portland General Electric Co	20.00
27000	Puget Sound Power & Light	10.80
42000	Puget Sound Power & Light	16.80
46000	Puget Sound Power & Light	18.40
5000	Pure Oil Company	2.00
32000	Republic Steel Corporation	12.80
13000	Sisters of Charity House of Pro	5.20
50000	Southern Ry. Co	20.00
22000	Southern Edison	8.80
27000	Southern Edison	10.80
20000	Southern Edison	8.00
1500	Spokane Civic Building Co	.60
30000	Southern Bell Tell. Co	12.00
25000	Union Oil Co. of Cal	10.00
40000	Vanadium Corporation of America	16.00
80000	Washington Water Power	32.00
		$457.60

[16]

PLAINTIFF'S EXHIBIT "D"

Tuesday, November 26, 1935

Pursuant to a call by the president a special meeting of the board of directors of Spokane and Eastern Trust Company of Spokane, Washington,

Plaintiff's Exhibit "D" (Continued)

was held in its banking house in the Spokane and Eastern Building in the City of Spokane, County of Spokane, State of Washington, on Tuesday, November 26, 1935, at the hour of 3:15 o'clock p. m., for the purpose of considering and acting upon the proposition of the consolfdation of said Bank with First National Bank of Seattle, a national banking association located in Seattle, King County, State of Washington, for the purpose of authorizing the execution of certain documents in connection with such consolidation, and also for the purpose of considering the proposition of the payment and retirement of all of the $750,000 in principal amount of the outstanding debentures of Spokane and Eastern Trust Company, and also for the purpose of considering the continuation and establishment of branches by the consolidated bank.

Mr. Joel E. Ferris, the president of the Bank, acted as chairman, and Mr. J. L. Campbell, secretary, acted as secretary.

The following directors were present:

JOEL E. FERRIS,
JOHN W. GRAHAM,
W. G. GRAVES,
R. INSINGER,
CONNER MALOTT,
W. S. McCREA,
W. H. MURGITTROYD,
R. L. RUTTER,
F. G. SPROWL,

Plaintiff's Exhibit "D" (Continued)

The following directors were absent:

ERIC A. JOHNSTON
W. T. TRIPLETT

(2)

The chairman presented and caused to be read to the meeting an Agreement of Consolidation providing for the consolidation of First National Bank of Seattle and Spokane and Eastern Trust Company of Spokane under the charter of First National Bank of Seattle, which agreement was in form approved by the Comptroller of the Currency. A duplicate original of said agreement was ordered identified and filed as a part of the records of the meeting, a copy thereof is in words and figures as follows:

"AGREEMENT OF CONSOLIDATION
between
FIRST NATIONAL BANK OF SEATTLE
and
SPOKANE AND EASTERN TRUST COMPANY
Under the Charter of
FIRST NATIONAL BANK OF SEATTLE
Under the Title of
SEATTLE-FIRST NATIONAL BANK

"This Agreement Made between First National Bank of Seattle, a banking association organized under the laws of the United States, located in the

Plaintiff's Exhibit "D" (Continued)

City of Seattle, County of King and State of Washington, with capital of $8,000,000, divided into 400,000 shares of common stock having par value of $20.00 each, and Spokane and Eastern Trust Company, a banking corporation (hereinafter referred to as an "association") organized under the laws of the State of Washington, located in the City of Spokane, County of Spokane [17] and State of Washington, with capital of $1,000,000 divided into 10,000 shares of common stock having par value of $100.00 each, and each acting pursuant to a resolution of its Board of Directors and by a majority of said Board, pursuant to the authority given by, and in accordance with the provisions of an Act of the Congress of the United States entitled "An Act to provide for the consolidation of National Banking Associations", approved November 7, 1918, as amended, Witnesseth as follows:

Section 1.

"First National Bank of Seattle and Spokane and Eastern Trust Company are hereby consolidated under the charter of First National Bank of Seattle, as hereby modified, and the Articles of Association of said First National Bank of Seattle are hereby amended to conform with this agreement.

Section 2.

"The name of the consolidated association shall be "Seattle-First National Bank", and the first article of the Articles of Association of First Na-

Plaintiff's Exhibit "D" (Continued)

tional Bank of Seattle is hereby amended to provide for the change in title.

"The place where its main banking house shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be at Nos. 700 to 722 Second Avenue, in the City of Seattle, County of King and State of Washington, with two branches in said City of Seattle located at No. 1328 Fourth Avenue and No. 408 Pike Street (Fourth & Pike Streets), such branches being now branches of First National Bank of Seattle and which were in lawful operation on February 25, 1927; and with such additional branches as may hereafter be operated according to law.

"The Board of Directors of the consolidated association shall have the power from time to time to change the location of the main office to any other place within the limits of the City of Seattle without action by the shareholders or approval by the Comptroller of the Currency, and may change the location of either of the branches provided for in this agreement as well as any branch which may hereafter be established to any other place within the limits of the municipality in which said branch is located, with the approval of the Comptroller of the Currency, as provided by law, and without action by the shareholders.

Section 3.

"The capital of the consolidated association shall be $8,000,000 divided into 400,000 shares of com-

Plaintiff's Exhibit "D" (Continued)

mon stock having par value of $20.00 each, subject to the right to change the amount of said capital hereafter in such manner as is now or shall in future be authorized by law.

"On the date of consolidation, the consolidated association shall have a surplus of $1,620,000 and undivided profits of not less than $2,380,000. Said capital, surplus and undivided profits at the date of consolidation shall then aggregate not less than $12,000,000.

Section 4.

"The assets contributed by each of said associations shall be passed upon and be acceptable to a committee of six, three to be appointed by the Board of Directors of each association. [18]

"As its contribution to the capital, surplus and undivided profits of the consolidated association, First National Bank of Seattle shall furnish net assets exceeding all liabilities of that association, except to its shareholders as such, by an amount not less than $10,400,000; and as its contribution to the capital, surplus and undivided profits of the consolidated association, Spokane and Eastern Trust Company shall furnish net assets exceeding all liabilities of that association, except to its shareholders as such, by an amount not less than $1,600,000.

"All of such assets shall be valued upon the following bases:

a. Cash shall be valued at par.

b. United States Government, State, Municipal, and other bonds and securities and corpo-

Plaintiff's Exhibit "D" (Continued)

rate stocks shall be valued at not to exceed current market values, with adjustment of interest, where such current market values may be readily ascertained from a recognized exchange.

c. Bonds, securities and corporate stocks, the current market values of which are not ascertainable from a recognized exchange, bills receivable, consisting of promissory notes, trade acceptances, bills of exchange, and other instruments of like or similar character, real estate, furniture, fixtures, and all other assets not mentioned above, shall be valued at an amount approved by the aforesaid committee of six, provided, however, that the said committee of six shall not place upon any asset a value in excess of the value placed thereon in the last preceding report of examination of the consolidating association made by a national bank examiner.

Section 5

"All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of every kind and description of each of the consolidating associations.

"No dividend shall be paid by either of the consolidating associations on its stock subsequent to the execution of this "Agreement of Consolidation" by the respective Boards of Directors of the consolidating associations.

Plaintiff's Exhibit "D" (Continued)

Section 6

"Of the capital of the consolidated association, 350,000 shares shall be allotted to the present shareholders of First National Bank of Seattle, being 7/8 share of $20.00 par value for each share of $20.00 par value now held by them, and 50,000 shares shall be allotted to the present shareholders of Spokane and Eastern Trust Company, being five shares each of $20.00 par value for each share of $100.00 par value now held by them, provided, however, that the shareholders of Spokane and Eastern Trust Company, who do not desire to accept five shares of stock in the consolidated association in exchange for each share of stock they now own in Spokane and Eastern Trust Company, shall have the option of taking cash at the rate of $160.00 for each share of stock of Spokane and Eastern Trust Company held by them. The stock in the consolidated association not taken by shareholders of Spokane and Eastern Trust Company, who elect to take cash, shall inure pro rata to the shareholders of the consolidated association. [19]

Section 7

"The Board of Directors of the consolidated association shall consist of not less than five nor more than twenty-five shareholders, as presently provided in the third Article of the Articles of Association of First National Bank of Seattle.

"The following named directors shall constitute the Board of Directors of the consolidated associa-

Plaintiff's Exhibit "D" (Continued)

tion until the next annual election and until their successors have been elected and qualified:

L. M. Arnold	L. C. Henry
M. A. Arnold	Chas. H. Ingram
J. H. Ballinger	T. Jerome
Wilfred H. Bordeaux	Richard E. Lang
F. H. Brownell	J. T. McVay
W. C. Butler	W. H. Parsons
Chas. F. Clise	Wm. Pigott, Jr.
E. B. Deming	Wm. G. Reed
R. H. Denny	Alfred Shemanski
A. S. Elford	E. A. Stuart
O. D. Fisher	J. A. Swalwell
P. E. Harris	Katheryn Wilson
J. T. Heffernan	

Section 8

"The provisions of this Agreement of Consolidation shall be subject to such amendment as may be made by the Boards of Directors of the consolidating associations and ratified and confirmed by the shareholders of the respective associations at the meetings to be held for the purpose of voting on the question of consolidating the two associations.

Section 9

"This consolidation shall become effective when it shall have been ratified and confirmed by the affirmative vote of the holders of at least two-thirds of the shares of stock, at the time outstanding, of said First National Bank of Seattle and of said Spokane and Eastern Trust Company, respectively,

Plaintiff's Exhibit "D" (Continued)

at respective meetings to be held pursuant to calls by the respective Boards of Directors thereof, and the Comptroller of the Curreney of the United States shall have issued his formal certificate under the seal of his office approving such consolidation.

"Witness the signatures and seals of said associations, this 26th day of November, 1935, each hereunto set by the President and attested by the Cashier, pursuant to a resolution of the Board of Directors, acting by a majority thereof, and witness the signatures hereto of a majority of each of said Boards of Directors.

FIRST NATIONAL BANK OF SEATTLE.

By M. A. ARNOLD,
President.

Attest:

H. MacDONALD,
Cashier.

[Signed]

M. A. Arnold
L. M. Arnold
Wilfred Bordeaux
Wm. C. Butler
Chas. F. Clise
E. B. Deming
R. H. Denny
A. S. Elford
L. C. Henry
Chas. H. Ingrain
T. Jerome
Richard E. Lang
W. H. Parsons
Wm. Pigott, Jr.
Alfred Shemanski
J. A. Swalwell
Katheryn Wilson

[Seal of Bank]

Directors of First National Bank of Seattle. [20]

Plaintiff's Exhibit "D" (Continued)

SPOKANE AND EASTERN TRUST COMPANY

By JOEL E. FERRIS,
President.

Attest:

[Signed] J. L. CAMPBELL,
Secretary.

[Signed]

Joel E. Ferris	W. S. McCrea
Conner Malott	John W. Graham
Will H. Murgittroyd	R. Insinger
F. G. Sprowl	W. G. Graves

[Seal of Bank]

Directors of Spokane and Eastern Trust Company.

"State of Washington,
County of King—ss.

On this 26th day of November, 1935, before me, a Notary Public for the State and County aforesaid, personally came M. A. Arnold as President, and H. C. MacDonald, as Cashier of First National Bank of Seattle, and each in his said capacity acknowledged the foregoing instrument to be the act and deed of said association and the seal affixed thereto to be its seal; and came also M. A. Arnold, L. M. Arnold, Wilfred Bordeaux, Wm. C. Butler, Chas. F. Clise, E. B. Deming, R. H. Denny, A. S. Elford, L. C. Henry, Chas. H. Ingram, T. Jerome,

Plaintiff's Exhibit "D" (Continued)

Richard E. Lang, W. H. Parsons, Wm. Pigott, Jr., Alfred Shemanski, J. A. Swalwell and Katheryn Wilson, being a majority of the Board of Directors of said association, and each of them acknowledged said instrument to be the act and deed of said association and of himself as a director thereof.

Witness my official seal and signature this day and year aforesaid.

[Signed] C. K. POE,
Notary Public in and for King County, Washington, residing at Seattle.

My commission expires May 3, 1936.

"State of Washington,
County of Spokane—ss.

On this 26th day of November, 1935, before me, a Notary Public for the State and County aforesaid, personally came Joel E. Ferris as President, and J. L. Campbell as Secretary of Spokane and Eastern Trust Company, and each in his said capacity acknowledged the foregoing instrument to be the act and deed of said corporation and the seal affixed thereto to be its seal; and came also Joel E. Ferris, Conner Malott, Will H. Murgittroyd, F. G. Sprowl, W. S. McCrea, John W. Graham, R. Insinger, and W. G. Graves, being a majority of the Board of Directors of said corporation, and each of them acknowledged said instru-

Plaintiff's Exhibit "D". (Continued)

ment to be the act and deed of said corporation and of himself as a director thereof.

Witness my official seal and signature this day and year aforesaid.

[Signed] W. I. HARVEY,
Notary Public in and for Spokane County, Washington, residing at Spokane.

My commission expires Jan. 17, 1939."

[Notarial Seal] [21]

After considering and discussing the proposed consolidation, upon motion duly made and seconded the following resolution was adopted by the affirmative vote of all the directors present:

Whereas, there has been presented and read to this meeting an Agreement of Consolidation between First National Bank of Seattle and Spokane and Eastern Trust Company of Spokane, Washington, which agreement is in form approved by the Comptroller of the Currency; and

Whereas, it is deemed for the best interests of this Bank that said agreement be entered into,

Now, Therefore, Be It Resolved by the board of directors of Spokane and Eastern Trust Company of Spokane, Washington, that this Bank enter into such agreement and that the president or any vice president and the secretary or any assistant secretary of this Bank be, and they hereby are, authorized and directed to execute such agreement in the

Plaintiff's Exhibit "D" (Continued)

name of this Bank and under its corporate seal, and that such agreement be executed by not less than a majority of the members of the board of directors of this Bank; and

Be It Further Resolved that a special meeting of the stockholders of this Bank be and the same hereby is called to be held at the banking house of this Bank at Spokane, Washington, on the 24th day of December, 1935, at 3:00 o'clock p. m., for the purpose of considering and acting upon the matter of the ratification and confirmation of said Agreement of Consolidation as presented to this meeting or as hereafter amended with the approval of this board and executed as provided by law, and that the officers of this Bank be and they hereby are authorized and directed to give proper notice of said meeting by publication and by registered mail as provided by law, and further authorized and directed to procure from the stockholders of this Bank a written waiver of published notice of said meeting if such waivers be obtainable.

Upon motion duly made and seconded the following resolution was adopted by the affirmative vote of all of the directors;

Whereas, this Bank and the First National Bank of Seattle have each established pursuant to law certain branches; and

Whereas, the board of directors of First National Bank of Seattle have authorized the making of an application to the Comptroller of the Currency for authority for the consolidated bank to establish

Plaintiff's Exhibit "D" (Continued)

and/or continue branches of the consolidated bank,

Now, Therefore, Be It Resolved by the board of directors of Spokane and Eastern Trust Company that the action of the board of directors of First National Bank of Seattle in authorizing and making of an application to the Comptroller of the Currency for authority for the consolidated bank to establish and/or continue branches of the consolidated bank be and the same hereby is approved, ratified and confirmed.

It was further duly moved, seconded and unanimously resolved that:

Whereas, the said Agreement of Consolidation provides for the contribution by each of the consolidating banks of certain assets and for the appointment of a committee to certify to the acceptability of the said assets to the Comptroller of the Currency,

Now, Therefore Be It Resolved by the Board of Directors of Spokane and Eastern Trust Company that Joel E. Ferris, Conner Malott, and W. T. Triplett be and they hereby are appointed to the committee referred to in Section 4 of said Agreement of Consolidation and to certify in such form as may be deemed desirable or be required by the Comptroller of the Currency the acceptability of the assets to be contributed by each of the consolidating banks. [22]

It was further moved, seconded and unanimously resolved that:

Be It Resolved that the officers of this Bank be

Plaintiff's Exhibit "D" (Continued)

and they hereby are authorized and directed to pay to Federal Reserve Bank of Minneapolis, as custodian and fiscal agent for Reconstruction Finance Corporation, on or before the effective date of the consolidation of this bank with First National Bank of Seattle, in payment in full of said debentures, the sum of $750,000, together with the interest accrued thereon to the date of receipt of such payment by said Federal Reserve Bank of Minneapolis, and to procure the consent of the Supervisor of Banking of the State of Washington and of Reconstruction Finance Corporation to such payment and retirement of debentures.

There being no further business to come before the Board the meeting was adjourned on the call of the president.

[Signed] JOEL E. FERRIS,
President.

[Signed] J. L. CAMPBELL,
Secretary. [23]

PLAINTIFF'S EXHIBIT No. "E"

Tuesday, December 24, 1935

Special meeting of stockholders of Spokane and Eastern Trust Company held in its Directors' Room, Spokane, Washington, at 3:00 P. M. The following stockholders, representing 110 shares, were present in person:

R. L. Rutter	10 shares
Joel E. Ferris	10 shares

Plaintiff's Exhibit No. "E"—Continued

William G. Graves	10 shares
R. Insinger	10 shares
Eric A. Johnston	10 shares
Conner Malott	10 shares
W. S. McCrea	10 shares
W. H. Murgittroyd	10 shares
Dr. F. G. Sprowl	10 shares
W. T. Triplett	10 shares
John W. Graham	10 shares
	110 shares

1. Meeting called to order by Joel E. Ferris, President.

2. J. L. Campbell, Secretary, exhibited affidavit of publication of notice of special meeting of the stockholders, which notice appeared in The Spokane Press, a daily newspaper of general circulation published in the City of Spokane, County of Spokane, State of Washington, which notice appeared in each issue of said paper for a period of twenty-eight days beginning the 26th of November, 1935. Copy of notice published and mailed is as follows:

"Spokane and Eastern Trust Company
Spokane, Washington
Stockholders' Meeting

"Notice is hereby given that pursuant to call of its directors a special meeting of the stockholders of Spokane and Eastern Trust Company, Spokane, Washington, will be held at its

Plaintiff's Exhibit No. "E"—Continued

banking house at 601 Riverside Avenue in the City of Spokane, State of Washington, on December 24, 1935, at 3:00 o'clock P. M., for the purpose of considering and determining by vote whether an agreement (in the form now on file at the bank, subject to such amendments thereto, if any, as may be made prior to the vote thereon by the stockholders) to consolidate the said bank and First National Bank of Seattle, located in the City of Seattle, State of Washington, under the provisions of the laws of the United States, shall be ratified and confirmed, and for the purpose of voting upon any other matters incidental to the proposed consolidation of the two banks. A copy of the aforesaid agreement executed by a majority of the directors of each of the two banks, providing for the consolidation, is on file at the bank and may be inspected during business hours.

J. L. CAMPBELL,
Secretary.

November 26, 1935.

The Secretary further reported that all of the shareholders had signed a waiver of notice of the meeting, a copy of which waiver is as follows:

"Waiver of Notice of Special Meeting of Stockholders of
SPOKANE AND EASTERN TRUST COMPANY

"The undersigned, being the holders of all

Plaintiff's Exhibit No. "E"—Continued

the outstanding capital stock of Spokane and Eastern Trust Company, a Washington banking corporation of Spokane, Washington, do hereby waive publication in a newspaper of general circulation in Spokane, publication in [24] the legal newspaper for the publication of legal notices and advertisements in the County of Spokane, State of Washington, and publication in any other newspaper, and mailing three weeks prior to the date of said meeting of notice of a special meeting of the stockholders of said bank called by the Board of Directors thereof to be held at the banking house of said bank in Spokane, Washington, on December 24th, 1935, at 3:00 o'clock P. M., for the purpose of considering and determining by vote whether an agreement to consolidate said bank with First National Bank of Seattle, a national banking association of Seattle, Washington, under the provisions of the laws of the United States shall be ratified and confirmed, and for the purpose of voting upon any changes in or amendments to said agreement, and voting upon any other matters incidental to or connected with the proposed consolidation, and consent that such meeting be held at the time and place above stated upon written notice thereof mailed to each stockholder of record by registered mail not less than ten (10) days prior to such meeting.

Plaintiff's Exhibit No. "E"—Continued
Dated December 24, 1935.

NORTHWEST BANCORPORATION,
By J. C. THOMSON,
Its President.
W. G. GRAVES,
F. G. SPROWL,
JOEL E. FERRIS,
W. T. TRIPLETT,
CONNER MALOTT,
JOHN W. GRAHAM,
W. S. McCREA,
WILL H. MURGITTROYD,
R. L. RUTTER,
R. INSINGER,
ERIC A. JOHNSTON."

3. J. L. Campbell and Conner Malott, Committee on Proxies, made the following report:

Stock represented by proxy	9890	shares
Stock represented in person	110	"
Stock not represented	0	"
	10000	"

4. The above report was accepted.

5. A majority of the stock being represented either in person or by proxy, the meeting was declared convened in due form.

6. The following resolution was adopted by the unanimous vote of all of the shares of said bank:

"Whereas, the Board of Directors of First National Bank of Seattle, a banking association organized under the laws of the United

Plaintiff's Exhibit No. "E"—Continued

States, located in the City of Seattle, County of King and State of Washington, has entered into an agreement with the Board of Directors of Spokane and Eastern Trust Company, a banking corporation organized under the laws of the State of Washington, located in the City of Spokane, County of Spokane and State of Washington, providing for the consolidation of the two banks into one national banking association under the charter of First National Bank of Seattle, and under the title of "Seattle-First National Bank", in accordance with the provisions of the Act of Congress approved November 7, 1918, as amended, said agreement entered into between the two Boards of Directors reading as follows: [25]

AGREEMENT OF CONSOLIDATION
between
FIRST NATIONAL BANK OF SEATTLE
and
SPOKANE AND EASTERN TRUST COMPANY
Under the Charter of
FIRST NATIONAL BANK OF SEATTLE
Under the Title of
"SEATTLE-FIRST NATIONAL BANK"

The Agreement made between First National Bank of Seattle, a banking association organized under the laws of the United States, located in the City of Seattle, County of King and State of Washington, with capital of $8,000,000, divided into

Plaintiff's Exhibit No. "E"—Continued

400,000 shares of common stock having par value of $20.00 each, and Spokane and Eastern Trust Company, a banking corporation (hereinafter referred to as an "association") organized under the laws of the State of Washington, located in the City of Spokane, County of Spokane and State of Washington, with capital of $1,000,000, divided into 10,000 shares of common stock having par value of $100.00 each, and each acting pursuant to a resolution of its Board of Directors and by a majority of said Board, pursuant to the authority given by, and in accordance with the provisions of an Act of the Congress of the United States entitled "An Act to provide for the consolidation of National Banking Associations", approved November 7, 1918, as amended, Witnesseth as follows:

Section 1

First National Bank of Seattle and Spokane and Eastern Trust Company are hereby consolidated under the charter of First National Bank of Seattle, as hereby modified, and the Articles of Association of said First National Bank of Seattle are hereby amended to conform with this agreement.

Section 2

The name of the consolidated association shall be "Seattle-First National Bank", and the first article of the Articles of Association of First National Bank of Seattle is hereby amended to provide for the change in title.

Plaintiff's Exhibit No. "E"—Continued

The place where its main banking house shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be at Nos. 700 to 722 Second Avenue, in the City of Seattle, County of King and State of Washington, with two branches in said City of Seattle located at No. 1328 Fourth Avenue and No. 408 Pike Street (Fourth & Pike Streets), such branches being now branches of First National Bank of Seattle and which were in lawful operation on February 25, 1927; and with such additional branches as may hereafter be operated according to law.

The Board of Directors of the consolidated association shall have the power from time to time to change the location of the main office to any other place within the limits of the City of Seattle without action by the shareholders or approval by the Comptroller of the Currency, and may change the location of either of the branches provided for in this agreement as well as any branch which may hereafter be established to any other place within the limits of the municipality in which said branch is located, with the approval of the Comptroller of the Currency, as provided by law, and without action by the shareholders.

Section 3

The capital of the consolidated association shall be $8,000,000, divided into 400,000 shares of common stock having par value of $20.00 each, subject to the right to change the amount of said capital

Plaintiff's Exhibit No. "E"—Continued

hereafter in [26] such manner as is now or shall in future be authorized by law.

On the date of consolidation, the consolidated association shall have a surplus of $1,620,000 and undivided profits of not less than $2,380,000. Said capital, surplus and undivided profits at the date of consolidation shall then aggregate not less than $12,000,000.

Section 4

The assets contributed by each of said associations shall be passed upon and be acceptable to a committee of six, three to be appointed by the Board of Directors of each association.

As its contribution to the capital, surplus and undivided profits of the consolidated association, First National Bank of Seattle shall furnish net assets exceeding all liabilities of that association, except to its shareholders as such, by an amount not less than $10,400,000; and as its contribution to the capital, surplus and undivided profits of the consolidated association, Spokane and Eastern Trust Company shall furnish net assets exceeding all liabilities of that association, except to its shareholders as such, by an amount not less than $1,600,000.

All of such assets shall be valued upon the following bases:

a. Cash shall be valued at par.

b. United States Government, State, Municipal, and other bonds and securities and cor-

Plaintiff's Exhibit No. "E"—Continued

porate stocks shall be valued at not to exceed current market values, with adjustment of interest, where such current market values may be readily ascertained from a recognized exchange.

c. Bonds, securities and corporate stocks, the current market values of which are not ascertainable from a recognized exchange, bills receivable, consisting of promissory notes, trade acceptances, bills of exchange, and other instruments of like or similar character, real estate, furniture, fixtures, and all other assets not mentioned above, shall be valued at an amount approved by the aforesaid committee of six, provided, however, that the said committee of six shall not place upon any asset a value in excess of the value placed thereon in the last preceding report of examination of the consolidating association made by a national bank examiner.

Section 5

All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of e ry kind and description of each of the consolidating associations.

No dividend shall be paid by either of the consolidating associations on its stock subsequent to the execution of this "Agreement of Consolidation"

Plaintiff's Exhibit No. "E"—Continued

by the respective Boards of Directors of the consolidating associations. [27]

Section 6

Of the capital of the consolidating associations, 350,000 shares shall be allotted to the present shareholders of First National Bank of Seattle, being 7/8 share of $20.00 par value for each share of $20.00 par value now being held by them, and 50,000 shares shall be allotted to the present shareholders of Spokane and Eastern Trust Company, being five shares each of $20.00 par value for each share of $100.00 par value now held by them, provided, however, that the shareholders of Spokane and Eastern Trust Company, who do not desire to accept five shares of stock in the consolidated association in exchange for each share of stock they now own in Spokane and Eastern Trust Company, shall have the option of taking cash at the rate of $160.00 for each share of stock of Spokane and Eastern Trust Company held by them. The stock in the consolidated association not taken by shareholders of Spokane and Eastern Trust Company, who elect to take cash, shall inure pro rata to the shareholders of the consolidated association.

Section 7

The Board of Directors of the consolidated association shall consist of not less than five nor more than twenty-five shareholders, as presently provided in the third Article of the Articles of Association of First National Bank of Seattle.

Plaintiff's Exhibit No. "E"—Continued

The following named directors shall constitute the Board of Directors of the consolidated association until the next annual election and until their successors have been elected and qualified:

L. M. Arnold
M. A. Arnold
J. H. Ballinger
Wilfred H. Bordeaux
F. H. Brownell
W. C. Butler
Chas. F. Clise
E. B. Deming
R. H. Denny
A. S. Elford
O. D. Fisher
P. E. Harris
J. T. Heffernan
L. C. Henry
Chas. H. Ingram
T. Jerome
Richard E. Lang
J. T. McVay
W. H. Parsons
Wm. Pigott, Jr.
Wm. G. Reed
Alfred Shemanski
E. A. Stuart
J. A. Swalwell
Katheryn Wilson

Section 8

The provisions of this Agreement of Consolidation shall be subject to such amendment as may be made by the Boards of Directors of the consolidating associations and ratified and confirmed by the shareholders of the respective associations at the meetings to be held for the purpose of voting on the question of consolidating the two associations.

Section 9

This consolidation shall become effective when it shall have been ratified and confirmed by the affirmative vote of the holders of at least two-thirds of the shares of stock, at the time outstanding, of said First National Bank of Seattle and of said Spokane and Eastern Trust Company, respectively, at respective meetings to be held pursuant to calls by

Plaintiff's Exhibit No. "E"—Continued

the respective Boards of Directors thereof, and the Comptroller of the Currency of the United States shall have issued his formal certificate under the seal of his office approving such consolidation. [28]

Witness the signatures and seals of said associations, this 26th day of November, 1935, each hereunto set by the President and attested by the Cashier, pursuant to a resolution of the Board of Directors, acting by a majority thereof, and witness the signatures hereto of a majority of each of said Boards of Directors.

FIRST NATIONAL BANK OF SEATTLE

By M. A. ARNOLD,
President.

Attest:

H. C. MacDONALD,
Cashier.

M. A. Arnold
L. M. Arnold
Wilfred Bordeaux
Wm. C. Butler
Chas. F. Clise
E. B. Deming
R. H. Denny
A. S. Elford
L. C. Henry
Wm. Pigott, Jr.
Alfred Shemanski
J. A. Swalwell
Katheryn Wilson
Chas. H. Ingram
T. Jerome
Richard E. Lang
W. H. Parsons

[Seal of Bank]

Directors of First National Bank of Seattle.

SPOKANE AND EASTERN TRUST COMPANY

By JOEL E. FERRIS,
President.

Plaintiff's Exhibit No. "E"—Continued

Attest:

J. L. CAMPBELL,
Secretary.

Joel Ferris	W. S. McCrea
Conner Malott	John W. Graham
Will H. Murgittroyd	R. Insinger
F. G. Sprowl	W. G. Graves

[Seal of Bank]

Directors of Spokane and Eastern Trust Company.

State of Washington,
County of King—ss.

On this 26th day of November, 1935, before me, a Notary Public for the State and County aforesaid, personally came M. A. Arnold as President, and H. C. MacDonald, as Cashier of First National Bank of Seattle, and each in his said capacity acknowledged the foregoing instrument to be the act and deed of said association and the seal affixed thereto to be its seal; and came also M. A. Arnold, L. M. Arnold, Wilfred Bordeaux, Wm. C. Butler, Chas. F. Clise, E. B. Deming, R. H. Denny, A. S. Elfored, L. C. Henry, Chas. H. Ingram, T. Jerome, Richard E. Lang, W. H. Parsons, Wm. Pigott, Jr., Alfred Shemanski, J. A. Swalwell and Katheryn Wilson, being a majority of the Board of Directors of said association, and each of them acknowledged said instrument to be the act and deed of said association and of himself as a director [29] thereof.

Plaintiff's Exhibit No. "E"—Continued

Witness my official seal and signature this day and year aforesaid.

[Seal of Notary] C. K. POE,
Notary Public in and for King County, Washington, residing at Seattle.

My commission expires May 3, 1936.

State of Washington,
County of Spokane—ss.

On this 26th day of November, 1935, before me, a Notary Public for the State and County aforesaid, personally came Joel E. Ferris as President, and J. L. Campbell as Secretary of Spokane and Eastern Trust Company, and each in his said capacity acknowledged the foregoing instrument to be the act and deed of said corporation and the seal affixed thereto to be its seal; and came also Joel E. Ferris, Conner Malott, Will H. Murgittroyd, F. G. Sprowl, W. S. McCrea, John W. Graham, R. Insinger, and W. G. Graves, being a majority of the Board of Directors of said Corporation, and each of them acknowledged said instrument to be the act and deed of said corporation and of himself as a director thereof.

Witness my official seal and signature this day and year aforesaid.

[Seal of Notary] W. I. HARVEY,
Notary Public in and for Spokane County, Washington, residing at Spokane.

My commission expires Jan. 17, 1939.

Plaintiff's Exhibit No. "E"—Continued

Therefore, Be It Resolved, That the agreement entered into between the Board of Directors of First National Bank of Seattle and the Board of Directors of Spokane and Eastern Trust Company be ratified and confirmed and that these banks be consolidated under the charter of First National Bank of Seattle and under the title of "Seattle-First National Bank", with capital stock of Eight Million Dollars ($8,000,000), such consolidation to become effective immediately upon its approval by the Comptroller of the Currency.

7. There being no further business to come before the meeting, upon motion it adjourned subject to call by the president.

JOEL E. FERRIS,
President.
J. L. CAMPBELL,
Secretary. [30]

September 1941 Term 128th day

Wednesday, April 1, 1942

Court Convened Pursuant to Adjournment, at 10:00 A. M.

Present: Honorable Lewis B. Schwellenbach, District Judge, A. A. LaFramboise, Clerk, Harvey Erickson, Assistant U. S. Attorney, R. R. Isaacs and Elwyn L. Daniel, Deputy U. S. Marshals.

[Title of Cause.]

PROCEEDINGS

RECORD OF TRIAL

Now on this 1st day of April, 1942, this case was regularly called for trial, both parties being ready, at which time the Court signed the pre-trial order.

The following witnesses were then sworn and testified on behalf of the plaintiff:

1. J. L. Campbell
2. Geo. H. Westerman
3. C. A. Nicholson

The following exhibits were received in evidence.

Plaintiff's Exhibit A Approval of Consolidation by Comptroller.

Plaintiff's Exhibit B Letter 1/25/37 re $500.00 tax on real estate transfer.

Plaintiff's Exhibit C Letter 1/25/37 re $457.60 tax on bond transfer.

Plaintiff's Exhibit D Minutes Board of Directors Spokane & Eastern 11/26/35.

Plaintiff's Exhibit E Minutes of Stockholders, Spokane & Eastern 12/24/35.

Plaintiff rested at 10:45 A. M.

Defendant offered no testimony. Arguments were then presented to the Court and the matter taken under advisement. Plaintiff's brief to be filed April 2, 1942, Defendant's brief to be filed April 8, 1942, and Plaintiff's reply brief to be filed April 10, 1942.

* * * * * * *

Thereupon Court adjourned until April 2, 1942, at 10:00 A. M. [31]

[Title of District Court and Cause.]

OPINION OF THE COURT

The plaintiff national banking association grew out of a consolidation in 1935 between the Spokane and Eastern Trust Company, a state bank and trust company of Spokane, and the First National Bank of Seattle, a national banking association. In this consolidation, the two institutions availed themselves of the provisions of Section 331, Chap. 614 of the Act of August 23, 1935, Title 12 U. S. C. A., Sec. 34 (a). Pursuant to that act, the necessary preliminary steps looking towards consolidation were taken by the directors and stockholders of the two banks. The consolidation was finally effectuated December 28, 1935, by the issuance of a certificate of consolidation by the Acting Comptroller of the Currency. Prior to the consolidation, the Spokane and Eastern Trust Company owned and held in its security account certain bonds and other securities. It had legal title to certain bonds and stocks which it held in trust. It owned the real estate which included its banking premises. As a consequence of the consolidation, without the issuance of any deed or other instrument of [32] conveyance as to the real estate and without the execution of any instrument of transfer as to the stocks and bonds and other securities, the title to all of such property became vested in the plaintiff. Defendant assessed transfer taxes against the plaintiff and required the purchase and cancellation of

revenue stamps therefor. Plaintiff protested such assessment and brings this action for the money paid thereon.

The pertinent portions of the statute under which the consolidation occurred are:

> "Any bank incorporated under the laws of any state * * * may be consolidated with a national banking association located in the same state * * * on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding * * *. Upon such a consolidation * * * the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights and franchises and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and

such consolidated national banking association, By virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights in the property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of the estates of lunatics and in every other judicial capacity, in the same manner and to the same extent as such rights, franchises and interests were held or enjoyed by any such constituent at the time of such consolidation: * *". (Title 12, U. S. C. A. Sec. 34 (a)).

The pertinent provisions of the Revenue Statutes are:

Schedule A-3 of Title VIII of the Revenue Act of 1926, as Amended by Section 723 (a) of the Revenue Act of 1932 (Title 26, U. S. C. A. Internal Rev. Acts, p. 290):

"3. Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation

or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation or other [33] organization (or of the shares where no certificates were issued), 4 cents, and where such shares or certificates are without par or face value, the tax shall be 4 cents or the transfer or sale or agreement to sell on each share (corporate share, or investment trust or other organization share, as the case may be)."

Schedule A-9 of Title VIII of the Revenue Act of 1926, as Amended, relating to the sales and transfers of bonds (Title 26 U. S. C. A. Internal Rev. Acts, p. 297):

"9. Bonds, etc., sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the instruments mentioned or described in subdivision 1 and of a kind the issue of which is taxable thereunder, whether made by an assignment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such instrument or not), on each $100 of face value or fraction thereof, 4 cents."

The pertinent Regulations which are applicable to both of the preceding sections are the two exempting provisions of Treasury Regulations 71, Article 35 (h) and (q) promulgated under the Revenue Act of 1926, approved July 27, 1928, as follows:

"Article 35: Sales and transfers not subject to tax.—The following transactions are not subject to the tax:

* * * * * * *

"(h) The transfer of shares or certificates of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the trust agreement, which is a transfer resulting wholly by operation of law.

"(q) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor."

The statute covering deeds of conveyance, Schedule A-8 of Title VIII of the Revenue Act of 1926 reads:

"8. Conveyances: Deed, instrument, or writing delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall

be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. This subdivision shall not apply to any instrument or writing given to secure a debt." (Title 26, U.S.C.A., Internal Rev. Acts, p. 297). [34]

Sporadically during our history, when financial necessities created by war or as the aftermath of war have arisen, the Congress has extended the field of federal taxation to include stamp taxes similar to the foregoing. They should be distinguished from purely excise or other taxes in which stamps are used as the paraphenalia for convenient collection. These tax statutes are passed exclusively for the purpose of raising revenue. Raybestos-Manhattan, Inc. v. United States, 296 U. S. 60. The breadth of the scope of the tax as defined in the statute requires the court to be strict in subjecting transfers to the tax. Founders General Corp. v. Hoey, 300 U. S. 268. They cover transfers of the mere legal title to the property involved by a trustee. Hartley v. Commissioner, 295 U. S. 216, 220.

From the reading of the foregoing excerpts from the statute, it can be seen that consideration of

this case necessarily divides itself into two parts: (1) Those taxes assessed against the claimed transfer of bonds, stocks and other securities and (2) the tax assessed against the claimed transfer of the real estate. The first classification must further be subdivided between (a) those securities which the bank had in its security account in which it had both the legal and beneficial title and (b) securities to which the bank had only legal title and which it held in trust.

1. As to the first group involving the securities, the plaintiff contends the tax to be improperly levied on the ground that the transfer of such securities resulted exclusively from operation of law. It bases this contention on the two Treasury Regulations heretofore quoted. Defendant's position is that the transfer of title was not wholly resultant from operation of law but that the operation of law was the mere culmination of the voluntary acts of the stockholders and directors of the two corporations which were the true motive force in the transfer.

Plaintiff relies on United States v. Merchants Nat. Trust & Savings Bank, 9th Cir. 101 F. (2d) 399. The consolidation in that case was under the California bank consolidation law. (Sec. 31, California Bank Act; Deering's General Laws, 1927, Act 652, Sec. 31). It provided, as does the act here, that "the purchasing bank shall, ipso facto and by operation [35] of law and without further transfer, substitution, act or deed, and in all courts and places, be deemed and held to have succeeded and

shall become subrogated and shall succeed to all rights, obligations, properties, assets, investments, deposits, demands, contracts, agreements; court and private trusts and other relations to any person, creditor, depositor, truster, principal or beneficiary of any court or private trust, obligations and liabilities of every nature, etc." That case involved only the trust assets to which the bank had legal but no beneficial title. Unquestionably, however, the basis upon which the court there decided the question was so broad as to make inevitable the conclusion that its decision would be the same as to securities contained in the bank's own investment account. The court relied upon the two exempting provisions of the Treasury Regulation heretofore cited and specifically held that a transfer under the California consolidation law was by operation of law and not by the voluntary act of the parties. It, therefore, held that Article 35 (q) of Treasury Regulation 71 applied. In addition, it held that where, under the California statute the business of the one corporate trustee was sold in solido to another trustee, the sale affected a successful resignation from its trust obligation and there was then appointed a substitute trustee who took over the trust. It concluded therefrom that Article 35.(h) of Treasury Regulation 71 controlled.

Defendant relies upon cases which, with the exception of those decided by the Court of Appeals of the Second Circuit, touch subjects so remote from the problem here as to be of no assistance in

the decision of this case. In Koppers Coal & Transportation Co. v. United States, Third Circuit, one of the constituent corporations in a merger transferred stock it owned to the resultant corporation. This merger was under the Delaware law which contained no provision similar to the United States banking act or to the California statute. It was necessary there for the constituent corporation to transfer its stock to the resultant corporation by endorsing and delivering it to the transfer agent for the issuance of new stock. The transfer was not effected by operation of law but by the positive act of the party. The question of the transfer by operation of law was only [36] injected into the case by the taxpayer who relied upon an entirely different regulation which covered mergers and not consolidations. The facts of that case do not touch the facts of this one at any material point.

It is in the Circuit Court of Appeals of the Second Circuit that the conflict with United States v. Merchants Nat. Trust & Savings Bank, supra, arises. That Court has held contrary to plaintiff's contention here. The first case was Weil et al. v. United States, 115 F. (2d) 999. There the New York Mortgage Commission, acting under an act passed for the relief of financial conditions during the depression, took over from the New York Superintendent of Insurance certain bonds and mortgages previously guaranteed by the New York Title and Mortgage Company. These bonds and mortgages had come into the possession of the Superin-

tendent of Insurance under the provisions of another act which simply gave him power to take them and hold them for the protection of investors. The task of the Mortgage Commission was broader. Under the law, its duty was to reorganize as well as to administer mortgage properties and to intermediate between the Superintendent of Insurance and the trustees for reorganization to be selected by the Court. In considering this case, the Second Circuit construed the two quoted Regulations squarely in support of defendant's position here. It held that, since the transfer to the trustees on reorganization could only be made with the consent of the owners of two-thirds of the mortgage investments, there was no transfer wholly by operation of law and that the tax was properly assessed. The rule was followed later in Niagara Hudson Power Corporation v. Hoey, 117 F. (2d) 414, for the same reasons expressed in the Weil case. Both of these cases were ones in which both legal and beneficial title were involved. In City Bank Farmers Trust Co. v. Hoey, 125 F. (2d) 577, the same question was presented except that it referred to the transfer of securities held in trust. Both of the Regulations heretofore quoted were considered by the Court. Both were rejected as inapplicable. The majority of the Court, in so deciding, stated: "We confess that it irks us to decide this issue against appellee," and "Regretfully, we hold that, on this point, the District Court erred." In a dissenting opinion, Judge Swan asserted his opinion that Article 35 (h)

of Regulations 71 [37] applied and that the Circuit Court of Appeals for the Ninth Circuit was right in its decision in United States v. Merchants Nat. Trust & Savings Bank, supra.

The situation, therefore, is that in the Second Circuit the Court unanimously and unequivocably held the tax applicable as to securities owned both legally and beneficially. On the case involving the tax on trust assets, the majority of the Court regretfully so held and the minority dissented. In the Ninth Circuit, the rule is that the transfer tax does not apply under either set of circumstances.

This Ninth Circuit decision is controlling upon me. Consequently, what I say concerning the merits of the problem need only be brief. None the less, I do venture my opinion concerning it. The problem consists solely of an analysis of the two Regulations. The question is—when the words "wholly by operation of law" are used, do they refer to the entire process of consolidation or do they refer merely to that portion of it referring to the transfer? Is the transfer separable? The importance of the two quoted Regulations makes necessary a brief discussion of the subject of administrative regulations in general. Unquestionably, this case cannot correctly be decided without some understanding of this troublesome problem.

Distinction must be made between two recognized classes of regulations. Those of the first class are promulgated under specific prospective authority from Congress granted because of Congress' recog-

nition of the obstacles preventing it from spelling out its answers to all the problems resulting from the act. The second group are promulgated under the authority of the delegated interpretative power to assist in the execution of a statute by the administrative agency. Often the necessity for interpretation comes from intentional legislative vagueness induced by exigencies in the progress of legislative manouvering. Gray, Nature and Sources of The Law (2d Ed.) 173. As to both groups, changing conditions and changing sets of problems make imperative some elasticity in the processes. In fact, frequently it is the recognition of the probability of changing conditions which causes the Congress to leave the task of prospectively spelling out the answers or of interpreting broad language to the administrative agency. Those regulations of the first class which text writers call legislative have [37A] the force of law upon promulgation. United States v. Grimaud, 220 U. S. 506. So long as they are confined within the limits of the statutory delegation, their force will be recognized by the courts even though the courts may consider them illiberal, inequitable or not conducive to the best results. Utah Power & Light Co. v. United States, 243 U. S. 389, 410.

To the extent that changed conditions may not alter a relationship between a legislative regulation and the problem for the solution of which it was promulgated, reenactment of the specific statute is of little weight in determining the validity of

the regulation. There is no true necessity for the alarm displayed by certain writers over the apparent disparity between the rulings of the Supreme Court in Helvering v. R. J. Reynolds Tobacco Co., 306 U. S. 110, and Helvering v. Wilshire Oil Co., Inc., 308 U. S. 90. To my mind, what is needed is a rationalization of the problem by permitting the court to ascertain whether there is a factual basis on which it can be concluded that the Congress intended to reenact the Regulation when it reenacted the statute. The difficulty with the rule in the past has been the necessity for its blind acceptance by the courts. No good ever comes from obstructing the efforts of inquiring minds which seek out the truth. Basically, the problem is one of interpretation. Success in interpretative technique requires it to be keyed to the essential characteristics of the modern law-making processes. The omniscience attributed by some courts to the Congress is astounding to one experienced in the handicaps of time-pressure by which the labors of members of that body are circumscribed. It appears to me that the way towards this rationalization has been pointed by the Supreme Court in Helvering v. Wilshire Oil Co., supra, and in White et al. v. Winchester Country Club, decided January 12, 1942, ... U. S. ...., and, by analogy in Interstate Commerce Commission v. Railway Labor Executives Association, decided March 2, 1942, ... U. S. ..... This rationalization should apply to legislative regulations where changed conditions make the reenactment

rule applicable and to all interpretative regulations.

Interpretative regulations are what Mr. Justice Jackson, in the Winchester Country Club case, characterized as "constructional crutches," [38] and their value lies in the fact that they either are the "substantially contemporaneous expressions of opinion of men who were active in the drafting of the statute", White v. Winchester Country Club, supra, or of such long standing as to merit the particular respect of the courts. Logan v. Davis, 233 U. S. 613; United States v. Joliet & Chicago Railroad Company, decided Jan. 19, 1942, ... U. S. ..... They may be both. Magruder v. Washington, Baltimore and Annapolis Realty Corp., decided April 13, 1942, ... U. S. ..... Regulations of this type may be ignored by the court even after reenactment if they are not uniform. United States v. Missouri Pacific Railroad Company, 278 U. S. 269, 280; or if they are ambiguous within themselves or are inconsistent with each other. Burnet v. Chicago Portrait Co., 285 U. S. 1, 16. Any regulation so ambiguous and inconsistent as to be impossible of interpretation in itself is obviously valueless in its function of assisting in the understanding of the statute it was supposed to simplify. The two regulations involved here are in the interpretative category. The problem in this case is to determine whether their use is proscribed by the rule in the Missouri Pacific and the Chicago Portrait cases. If they are, nothing new was added to them by the

reenactment of the statute after their promulgation.

Any value for interpretative purposes possessed by these two regulations is destroyed by their own ambiguity and inconsistency. They each seek to exempt transfers resulting wholly by operation of law. They each specifically include in that category examples patently outside that category. A transfer arising from a trustee's resignation is never one by operation of law. Neither is one to the executor of an estate. Each of these transactions requires the purposeful, active intervention of one of the parties. "An estate is said to 'devolve' on another when by operation of law, and without any voluntary act of the previous owner, it passes from one person to another; but it does not devolve from one person to another as the result of some positive act or agreement between them. The word is itself of intransitive significance, and does not include the result of an act which is intended to produce a particular effect. It implies a result without the intervention of any voluntary actor. Francisco v. Aguirre, 29 Pac. 495, 497, 94 Cal. 180; First Nat. [39] Bank of San Jose v. Menke, 60 Pac. 675, 677, 128 Cal. 103" Volume 3, Words and Phrases (Old Series), page 2050." Life Estates created by marriage under Curtesy and Dower Statutes result from operation of law but those created by will do not. 17 R.C.L. 616. This because the primary purpose of the act of making the will was the creation of the estates. In a marriage that result is only incidental.

The Federal courts have recognized the distinction in those cases where under Equity Rule 27 (New Federal Rules of Civil Procedure, Rule 23) the plaintiff in a stockholders suit is required to allege that he was "a shareholder at the time of the transaction of which he complains or that his share thereafter devolved upon him by operation of law." McQuillon v. National Cash Register Co., 112 F. (2d) 877, 882; Whitaker v. Whitaker Iron Co., 249 F. 536.

It may lie within the province of Congress for tax purposes to endow transactions with legal attributes they do not possess. Credit Alliance Corporation v. Commissioner, 42 B.T.A., 1020; Helvering v. Credit Alliance Corporation, 122 F. (2d) 361. No such power is given to the executive in the promulgation of interpretative regulations. To assume the propriety of the delegation of such power is to ignore the distinction made by Justice Cardozo in his dissent in Panama Refining Co. v. Ryan, 293 U. S. 388, 440, and his concurring opinion in Schechter Corp. v. United States, 295 U. S. 495, 551. As he indicated, delegated power must be canalized within banks that keep it from overflowing. It can not be unconfined and vagrant.

The further fatal weakness of plaintiff's position is that it urges me to use these unsound constructional crutches as the bases for an analogy which does not fall within the broadest possible meaning of the language of the regulation. That I can not do. Pound, Courts and Legislation, 77 Cent. L. J.

219. The intent of the Regulations is clear. It is to exempt transfers resulting wholly by operation of law. Advantage can not be taken of the use of erroneous examples in the faulty Regulations to extend their errors into fields they do not touch.

If this question was one of first impression in this Circuit, I would hold the assessments on this phase of the case to be proper. However, [40] in view of United States v. Merchants Nat. Trust & Savings Bank, supra, judgment for the return of these particular assessments must be entered.

2. The next question involves the tax upon the real estate. It will be noted that this section of the statute is much more restricted than are the others which we have been considering. It requires that "the deed, instrument, or writing delivered * * * whereby any lands, tenements or other realty sold shall be granted, assigned, transferred or otherwise conveyed to or vested in the purchaser or purchasers or any other person or persons." There are 42 Regulations applicable to this section. Counsel have referred to many of them and have argued that I should construe the statute in the light of all of them. I have patiently tried to fit together the various Regulations in an effort to evolve therefrom a pattern which would be of assistance in construction. It is clear that those who wrote the Regulations had no such pattern in contemplation. To attempt to devise such an effective pattern here is impossible. One might as well attempt to fit together a jig saw puzzle which has no pattern. Only

Article 75 of the Regulations is of value. It reads:

> "The act requires that the person who makes, signs, or issues any instrument taxable thereunder shall affix and cancel the revenue stamps."

The only person who made, signed or issued any instrument in this transfer was the Deputy Comptroller of the Curreney who signed the certificate of consolidation. Reasoning from which it might be concluded that he should have affixed revenue stamps thereon would be artificial. The only case submitted upon this phase is Carpenter v. White, 80 F. (2d) 145. It contains nothing of value here. It involved the transfer of real estate by deeds of two corporations in a non-statutory merger. It was decided exclusively upon the question of fact as to whether or not there was consideration for these deeds. In the case at bar, the tax was improperly assessed. There was no deed, instrument or writing delivered. No lands, tenements or other realty were sold. There was no purchaser to whom any land, tenements or realty were granted, assigned, transferred or otherwise conveyed or vested in. Of particular importance upon this point is the provision of the banking statute, 12 U.S.C.A. Sec. 34 (a) reading: [41]

> "The corporate existence of each of the constituent banks and national banking associations participating in such consolidations shall be merged into and continued in the consolidated national banking association and the con-

solidated association shall be deemed to be the same corporation as each of the constituent institutions."

An examination of the original statutes reveals that this particular provision became a part of the act by virtue of the amendment of June 16, 1933, 48 Stat. 190. The original Act of November 7, 1918, 40 Stat. 1043, simply provided for the consolidation of national banking associations. This was enlarged by the Act of February 25, 1927, 44 Stat. 1224, to include state banks. The amendment of June 16, 1933, was a part of the general banking act of that year which involved all of the ramifications of the national banking statutes and resulted from the experience in and lessons learned from the bank collapse in the spring of that year. I have carefully examined the legislative record endeavoring to ascertain the specific purpose of the inclusion of this particular language. I find nothing in that record which directly answers the question. However, by reading all of the debates on the floor of both Houses of Congress, I am convinced that the explanation is clear and simple. Those debates indicate clearly the knowledge of and interest in, by Members of Congress, the long-standing controversy between the national and state banking systems in this country. They show the jealousies which long existed between the two systems and the determined effort on the part of each to prevent proselyting by the other. It is apparent from the discussions that even the tragedy of the bank col-

lapse and the hardships of the bank holiday had not resulted in a sufficient attitude of cooperation upon the part of the state banks for strengthening the banking structure of the country by means of consolidation with stronger national banks. To quote from these discussions or even to make reference to the innumerable times when this issue arose during the First Session of the 73d Congress would unduly tax this opinion. Merely by way of example, I refer to the colloquy between Senators Glass, Costigan and Cousins. Congressional Record, Vol. 77, Part 4, p. 3727, et seq; and the colloquy between Congressmen Steagall and May, Congressional [42] Record, Vol. 77, Part 4, p. 3837 et seq; and the speech by Congressman Patman, Congressional Record, Vol. 77, Part 4, p. 3840 et seq. To one familiar with the course of procedure of Congressional debates and the methods used by the Congress in the accomplishment of results, it is apparent that this particular amendment was injected into the law to speed up state and national consolidations. It is a difficult statute to interpret. For a new corporation to be created and to be deemed the same corporation as each of the constituent institutions, which constituents are to be continued in the consolidated corporation, is an anomaly in the law. When Koppers Coal & Transportation Co. v. The United States, supra, was presented to the Circuit Court of Appeals for the Third Circuit, counsel for the taxpayer urged that the same result had occurred under the Delaware Stat-

ute which contained no such provision. Judge Biggs emphatically rejected the theory on the ground that it was "metaphysical." The action of the Congress, in writing it into the Federal statute takes it out of the realm of metaphysics. Regardless of how the statute might be characterized, unquestionably in consolidations effected under it, there was no grant, assignment, transfer or conveyance of real estate on which the stamp tax provided by Schedule A Title VIII of the Revenue Act of 1926, as amended, could be assessed.

3. Plaintiff further seeks recovery of the amount paid on the compromise settlement of criminal liability under Sec. 802 of the Revenue Act of 1926, Title 26 U.S.C.A. Internal Revenue Acts, p. 285. Since I have held that there was no tax due, the logic of the situation would seem to indicate that plaintiff's claim should be granted. However, that is not the law. Compromises authorized by Title 26 U.S.C.A. 3761 (a) are binding and final. Backus v. United States, 59 F. (2d) 242. Certiorari denied, 289 U. S. 610; Walker v. Alamo Foods Co., 16 F. (2d) 694. Certiorari denied, 274 U. S. 741; Shaw & Truesdell Co. v. United States, 1 Fed. Supp. 834. Such a result in this case is unfortunate. The highly debatable character of this assessment should have induced the Collector to desist from his threats of criminal prosecution. They smack too much of the political philosophy of subservience of the individual to the state which today [43] threatens the world. Public officials in a democracy

should learn that only those deserve power who are willing to use it sparingly.

Judgment will be entered in accordance with this opinion.

L. B. SCHWELLENBACH
United States District Judge

April 20, 1942.

[Endorsed]: Filed April 20, 1942. [44]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action having come on for trial before the court without a jury upon the pleadings and proofs adduced by counsel for the respective parties, the court makes the following

FINDINGS OF FACT

1. Plaintiff brings this action against the United States pursuant to the provisions of Section 1122 (c) of the Revenue Act of 1926 amending paragraph 20 of Sec. 24 of the Judicial Code, U. S. C. A. Title 28, Sec. 41 (20).

2. Prior to December 28, 1935, the First National Bank of Seattle was a national banking association duly formed under the provisions of the National Banking Act.

3. The Spokane and Eastern Trust Company was a state bank and trust company organized and

existing under the laws of the State of Washington. As a trust company it held in trust for certain beneficiaries certain bonds and stock, the legal title to which was vested in it as trustee, executor, administrator, guardian or in other fiduciary capacities.

4. As a state bank the said Spokane and Eastern Trust Company likewise held certain real estate, including its banking premises and certain bonds and other securities, to all of which real estate, bonds and securities it held the legal title as a part of its corporate assets. [45]

5. On December 28, 1935, pursuant to Sec. 331, Chapter 614 of the Act of August 23, 1935, U. S. C. A. Title 12, Sec. 34a, the First National Bank of Seattle and the Spokane and Eastern Trust Company, consolidated, becoming, pursuant to such consolidation, Seattle-First National Bank, a national banking association, plaintiff herein.

6. Pursuant to this consolidation the corporate existence of each of the constituent banks participating in the consolidation was merged into and continued in the consolidated national banking association resulting therefrom, Seattle-First National Bank, and all the rights of the Spokane and Eastern Trust Company in the real estate and stock and bonds owned by it, the title to which it held as a part of its corporate assets, were, pursuant to said section of the National Bank Act, deemed to be transferred to and vested in the consolidated na-

tional banking association without any deed or other transfer, and the said Seattle-First National Bank became the owner thereof solely by operation of law. Likewise the consolidated national banking association, plaintiff herein, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, became entitled to hold and enjoy the same and all rights of property as trustee, executor, administrator, guardian or other fiduciary as the Spokane and Eastern Trust Company held at the time of the consolidation, and the legal title to the said assets held by the Spokane and Eastern Trust Company, in trust as aforesaid, passed to the plaintiff herein by virtue of said consolidation solely by operation of law.

7. Thereafter the Treasury Department of the United States, through its Internal Revenue Service, made an examination of the assets held by the plaintiff as trustee, executor, administrator, guardian and in other fiduciary capacities which had formerly been held by the Spokane and Eastern Trust Company in a like capacity and of the real estate and other assets owned by the Plaintiff which were formerly owned by the Spokane and Eastern Trust Company and asserted that the plaintiff as trustee had acquired the said assets held in the said trust accounts by [46] a transfer taxable under the Revenue Acts of the United States and required the plaintiff to pay on account of said trust assets the sum of $673.88 by purchasing and affixing to the various stock and bonds and

other instruments held as trust assets stamps in the said total amount, and the plaintiff did pay the said amount by purchasing said stamps and affixing the same to the said instruments. The Treasury Department of the United States likewise asserted that the plaintiff had acquired the real estate and banking premises, together with the bonds and other securities held by it, as owned assets by a transfer taxable under the Revenue Acts of the United States and required the plaintiff to pay on account of said owned assets the sum of $1,057.60, consisting of a transfer tax upon the said real estate and banking premises of $500, upon the bonds and securities of $457.60 and the sum of $100 in compromise of criminal liability under Sec. 802 of the Revenue Act of 1926, Title 26 U. S. C. A., Sec. 376 (a), by purchasing and cancelling stamps in a total amount of $957.60 and by paying in compromise of said criminal liability the sum of $100 and the plaintiff did pay the said amount by purchasing the said stamps and cancelling the same and paying the sum of $100 in compromise.

8. Payment of the said transfer taxes and of the said $100 in compromise was made January 25, 1937.

9. On March 23, 1939, plaintiff filed a claim for refund of the said stamp taxes assessed upon the asserted transfer of the assets held by plaintiff in the trust accounts in the total sum of $673.88, together with interest thereon from the date of payment, January 25, 1937, and filed a further claim for the refund of the stamp taxes assessed upon the

asserted transfer of the real estate, banking premises and other owned assets held by the plaintiff as owned assets in the total sum of $957.60, together with a refund of the compromise in the sum of $100 assessed and collected, together with interest thereon from date of payment, January 25, 1937. [47]

10. On December 23, 1940, the said claims in the respective amounts of $673.88, together with interest thereon, and in the sum of $957.60, together with interest thereon, together with the compromise in the sum of $100, were rejected and refused.

Dated May 14, 1942.

L. B. SCHWELLENBACH
United States District Judge

From the foregoing facts the court concluded as a matter of law:

CONCLUSIONS OF LAW

1. The Treasury Department of the United States, through its Internal Revenue Service, has erroneously and illegally assessed and collected Internal Revenue taxes from the plaintiff without authority of law and the plaintiff is now entitled to recover the sum of $1,631.48, together with interest thereon from January 25, 1937, at the rate of 6% per annum to a date within thirty days preceding the date of payment, as prescribed by Sec. 177 of the Judicial Code, as amended, Title 28 U.S.C.A. Sec. 284.

2. Plaintiff is not entitled to recover the sum of $100 paid by it in compromise of the criminal liability pursuant to Sec. 802 of the Revenue Act of 1926, Title 26 U.S.C.A., Sec. 276 (a).

3. Plaintiff is entitled to recover its costs herein to be taxed.

Dated May 14th, 1942.

L. B. SCHWELLENBACH
United States District Judge

Presented by

ARNOLD L. GRAVES

Copy received April 25, 1942.

EDWARD M. CONNELLY
HARVEY ERICKSON
Attorneys for Defendant

By TAYLOR

[Endorsed]: Filed May 14, 1942. [48]

In the District Court of the United States
for the Eastern District of Washington
Northern Division

No. Civ. 218

SEATTLE-FIRST NATIONAL BANK
Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

This cause having come on to be heard upon the pleadings and upon the proofs adduced by the parties hereto and the court having made and entered its findings of fact and conclusions of law.

It Is Adjudged and Decree that:

1. Plaintiff have judgment against the defendant for the sum of $1,631.48, together with interest thereon from January 25, 1937, at the rate of 6% per annum to a date within thirty days preceding the date of payment as prescribed by Sec. 177 of the Judicial Code, as amended, Title 28 U. S. C. A. Sec. 284, together with its costs herein to be taxed.

Approved, Clerk is directed to enter.

Dated, May 14, 1942.

L. B. SCHWELLENBACH
United States District Judge

Presented by

ARNOLD L. GRAVES

Copy received April 25, 1942.

EDWARD M. CONNELLY
HARVEY ERICKSON
Attorneys for Defendant
By TAYLOR

[Endorsed]: Filed May 14, 1942. [49]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO THE CIRCUIT COURT OF APPEALS NINTH CIRCUIT

Notice is hereby given that the defendant, United States of America, hereby appeals to the Circuit Court of Appeals, Ninth Circuit, from the final Judgment entered in this action on May 14, 1942.

EDWARD M. CONNELLY,
United States Attorney
HARVEY ERICKSON
Assistant United States
Attorney
Attorneys for Defendant
332 Federal Building

Copy mailed to Graves, Kizer & Graves, Attorneys for Plaintiff this 11th day of August, 1942.

A. A. LaFRAMBOISE,
Clerk, U. S. District Court

[Endorsed]: Filed August 11, 1942. [50]

[Title of District Court and Cause.]

CONCISE STATEMENT OF THE POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL

Comes now the defendant appellant United States of America and makes this concise statement of points upon which it intends to rely on appeal:

1. The Court erred in ordering and entering judgment against defendant and in failing to dismiss plaintiff's complaint.

2. The findings do not support the judgment or the Court's conclusions of law.

3. The Court erred in making and entering Finding No. 6 for the reason that it is not supported by the evidence and consists of conclusions of law rather than a finding or findings of fact, or it involves a mixed question of fact and law.

4. The Court erred in holding (Conclusion of Law 1) that the taxes for which recovery was granted were erroneously and illegally assessed and erroneousy and illegally collected from plaintiff.

5. The Court erred in holding (Conclusion of Law 3) that the plaintiff is entitled to recover its costs herein.

6. The Court erred in determining that the transfer and/or delivery to the plaintiff of the corporate stocks and bonds, to which the constituent state bank had both legal and beneficial title, was not subject to the stamp tax and occurred solely by operation of law.

7. The Court erred in determining that the delivery and/or transfer to the plaintiff of the corporate stocks and bonds, to which the constituent state bank held mere legal title in various trust [51] capacities, was not subject to stamp tax and occurred solely by operation of law.

8. The Court erred in determining that the transfer to or vesting in plaintiff of the real estate owned by the constituent state bank did not result in stamp tax liability and occurred solely by operation of law.

EDWARD M. CONNELLY
HARVEY ERICKSON
Attorneys for defendant appellant United States of America
332 Federal Bldg.,
Spokane, Wash.

Copy received this 1st day of September, 1942.

GRAVES, KIZER & GRAVES
Attorneys for plaintiff appellee

[Endorsed]: Filed Sept. 1, 1942. [52]

[Title of District Court and Cause.]

DESIGNATION OF PORTIONS OF RECORD TO CONSTITUTE RECORD ON APPEAL

Comes now the defendant appellant United States of America and hereby designates the portions of

the record, proceedings and evidence to be contained in the record on appeal in the above-entitled cause, to-wit:

1. Complaint
2. Answer
3. Pre-Trial Order dated April 1, 1942
4. Pre-Trial Order dated March 12, 1942
5. Exhibits "A", "B", "C", "D", and "E"
6. Clerk's minutes at time of trial showing testimony introduced only for identification of Exhibits
7. Opinion of Court dated April 20, 1942
8. Findings of Fact and Conclusions of Law
9. Judgment
10. Notice of Appeal
11. Statement of Points to be relied upon

EDWARD M. CONNELLY
HARVEY ERICKSON
Attorneys for defendant appellant United States of America
332 Federal Bldg.,
Spokane, Wash.

Copy received this 1st day of September, 1942.

GRAVES, KIZER & GRAVES
Attorneys for plaintiff appellee

[Endorsed]: Filed Sept. 1, 1942. [53]

[Title of District Court and Cause.]

United States of America
Eastern District of Washington—ss.

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered 1 to 53 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal therein in the United States Circuit Court of Appeals as called for by the Designation of Portions of Record to Constitute Record on Appeal as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on appeal of United States of America from the final judgment of the District Court of the United States for the Eastern District of Washington to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

In Witness Whereof, I have hereunto subscribed my nan. and affixed the seal of the aforesaid District Court, this 16th day of September, A. D. 1942.

[Seal] A. A. LaFRAMBOISE,
Clerk; U. S. District Court,
Eastern District of Washington.

[Endorsed]: No. 10254. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Seattle-First National Bank, a national banking association, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed September 18, 1942.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10254

UNITED STATES OF AMERICA,

Appellant,

vs.

SEATTLE-FIRST NATIONAL BANK,

Appellee.

CONCISE STATEMENT OF POINTS UPON WHICH APPELLANT INTENDS TO RELY UNDER RULE 19-6 (C.C.A. 9)

Comes now the appellant United States of America and makes this concise statement of points upon which it intends to rely on appeal:

1. The Court erred in ordering and entering judgment against defendant and in failing to dismiss plaintiff's complaint.

2. The findings do not support the judgment or the Court's conclusions of law.

3. The Court erred in making and entering Finding No. 6 for the reason that it is not supported by the evidence and consists of conclusions of law rather than a finding, or findings of fact, or it involves a mixed question of fact and law.

4. The Court erred in holding (Conclusion of Law 1) that the taxes for which recovery was granted were erroneously and illegally assessed and erroneously and illegally collected from plaintiff.

5. The Court erred in holding (Conclusion of Law 3) that the plaintiff is entitled to recover its costs herein.

6. The Court erred in determining that the transfer and/or delivery to the plaintiff of the corporate stocks and bonds, to which the constituent state bank had both legal and beneficial title, was not subject to the stamp tax and occurred solely by operation of law.

7. The Court erred in determining that the delivery and/or transfer to the plaintiff of the corporate stocks and bonds, to which the constituent state bank held mere legal title in various trust capacities, was not subject to stamp tax and occurred solely by operation of law.

8. The Court erred in determining that the transfer to or vesting in plaintiff of the real estate

owned by the constituent state bank did not result in stamp tax liability and occurred solely by operation of law.

EDWARD M. CONNELLY
United States Attorney
HARVEY ERICKSON
Assistant United States Attorney
Attorneys for Appellant
United States of America
332 Federal Building
Spokane, Washington

Copy received this 1st day of September, 1942.

GRAVES, KIZER & GRAVES
Attorneys for Appellee

[Endorsed]: Filed Sep. 4, 1942.

[Endorsed]: Filed Sep. 18, 1942.

[Title of District Court and Cause.]

APPELLANT'S DESIGNATION OF PARTS OF THE RECORD TO BE PRINTED IN THE RECORD ON APPEAL

To the Clerk of the Circuit Court of Appeals for the Ninth Circuit:

Pursuant to the provisions of Rule 19, Subdivision 6, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, Appellant

hereby designates as the record to be printed as the record on this appeal the entire transcript of record heretofore docketed in this Court, including appellant's statement of points on which it intends to rely, which also have been filed in this Court; also this designation.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

Of counsel:

EDWARD H. CONNELLY,
United States Attorney.

A copy of the foregoing designation of record was sent to counsel for appellee, Messrs. Graves, Kizer and Graves, Old National Bank Building, Spokane, Washington, this 24th day of September, 1492.

[Endorsed]: Filed Sep. 26, 1942.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Excerpt from proceedings of Monday, April 12, 1943

No. 10254

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE-FIRST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE

Order of Submission

Before GARRECHT, HANEY, and HEALY, Circuit Judges.

Ordered appeal herein argued by Mr. George H. Zeutzius, Special Asst. to the Attorney General, counsel for appellant, and by Mr. Arnold L. Graves, counsel for appellee, and submitted to the court for consideration and decision.

United States Circuit Court of Appeals for the Ninth Circuit

Excerpt from proceedings of Monday, May 24, 1943

No. 10254

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE-FIRST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE

Order directing filing of opinion, and filing and recording of judgment

Before GARRECHT, HANEY, and HEALY, Circuit Judges.

By direction of the Court, ORDERED that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the clerk, and that a judgment be filed and recorded in the minutes of this Court in accordance with the opinion rendered.

541863—43

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10254—May 24, 1943

UNITED STATES OF AMERICA, APPELLANT,

v.

SEATTLE-FIRST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE.

Upon appeal from the District Court of the United States for the Eastern District of Washington, Northern Division

Before GARRECHT, HANEY, and HEALY, Circuit Judges.

HEALY, Circuit Judge: The question presented here is whether a statutory consolidation of banks under the National Bank Act (12 U. S. C. A. § 34a) involves liability for documentary stamp tax under § 800 and Schedules A–3, A–8, and A–9, Title VIII, Revenue Act of 1926, as amended.

In 1935 a state bank, the Spokane and Eastern Trust Company, consolidated with the First National Bank of Seattle under the name of Seattle-First National Bank. Upon the ratification of the consolidation agreement by the stockholders the comptroller of the currency issued the necessary certificate of approval, reciting that the directors and shareholders of both banks had complied with the provisions of the Act.

The Spokane and Eastern Trust Company owned real estate whereon its banking house was located and securities in which a portion of its capital and surplus was invested. It had title also to securities as trustee, executor, guardian, etc. Stamps for the documentary tax required by the statute in the case of conveyances of real estate and transfers of stocks and bonds were not purchased nor affixed to any documents. The collector exacted a tax from the consolidated bank on the theory that the consolidation had resulted in taxable transfers. On a suit for refund the bank had judgment and the government appeals.

The Act of November 7, 1918, as amended February 25, 1927, 12 U. S. C. A. § 34a, authorizes the consolidation of a state bank with a national banking association located in the same state. For reasons which will be apparent on reflection the Act provides for the continued corporate existence of the constituent banks participating in the consolidation, and the consolidated association is "deemed to be the same corporation as each of the constituent institutions." The statute further provides that "all the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and

choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation: * * *"

In the case before us no deed, assignment or other instrument was executed to transfer real estate, stocks, bonds, or other property whether held in a fiduciary capacity or owned outright by the bank. The certificates were not endorsed, nor was there any delivery or change of possession other than that which may be implied from the consolidation. The government contends, however, that the transfers did not occur solely by operation of law, but that the execution of the consolidation agreement, itself an affirmative voluntary act, effected the transfers; hence the agreement was a taxable instrument within the purview of the Revenue Act and regulations thereunder.

In this circuit the point has been determined adversely to the position of the Treasury in *United States* v. *Merchants Nat. Trust & Savings Bank*, 101 F. 2d 399. Further elaboration of the discussion there would serve merely to encumber the reports. The Court of Appeals of the Second Circuit in *City Bank Farmers Trust Co.* v. *Hoey*, 125 F. 2d 577, has reached a different conclusion and apparently the First Circuit has also, *State Street Trust Co.* v. *Hassett*, 134 F. 2d 156, so that if we are wrong the government is in a favorable position to ask that we be set right.

Affirmed.

(Endorsed.) Opinion. Filed May 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10254

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE-FIRST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION, APPELLEE

Upon appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

This cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Eastern District of Washington, Northern Division, and was duly submitted.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

(Endorsed.) Judgment. Filed and entered May 24, 1943. Paul P. O'Brien, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit

No. 10254

UNITED STATES OF AMERICA, APPELLANT

v.

SEATTLE-FIRST NATIONAL BANK, APPELLEE

Order staying issuance of mandate

Upon application of Mr. Harvey Erickson, Assistant United States Attorney, counsel for the appellant, and good cause therefor appearing, it is ordered that the issuance, under Rule 28, of the mandate of this Court in the above cause be, and hereby is stayed to and including August 24, 1943; and in the event the petition for a writ of certiorari to be made by the appellant herein be docketed in the Clerk's office of the Supreme Court of the United States on or before said date, then the mandate of this Court is to be stayed until after the said Supreme Court passes upon the said petition.

FRANCIS AGARRECHT,
United States Circuit Judge.

Dated: San Francisco, California, June 12, 1943.

(Endorsed.) Order, etc. Filed June 12, 1943. Paul P. O'Brien, Clerk.

Certificate of clerk, U. S. Circuit Court of Appeals for the Ninth Circuit, to record certified under rule 38 of the Revised Rules of the Supreme Court of the United States

I, Paul P. O'Brien, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing ninety-eight (98) pages, numbered from and including 1 to and including 98, to be a full, true and correct copy of the entire record of the above-entitled case in the said Circuit Court of Appeals, made pursuant to request of Hon. Charles Fahy, Solicitor General of the

United States, counsel for the appellant, and certified under Rule 38 of the Revised Rules of the Supreme Court of the United States, as the originals thereof remain on file and appear of record in my office.

ATTEST my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this 14th day of July A. D. 1943.

[SEAL]

PAUL P. O'BRIEN,
Paul P. O'Brien,
Clerk.

U. S. GOVERNMENT PRINTING OFFICE: 1943

Supreme Court of the United States

Order allowing certiorari

Filed October 11, 1943

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1943

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statute and regulations involved	2
Statement	2
Specification of errors to be urged	5
Reason for granting the writ	6
Appendix	8

CITATIONS

Cases:	
Carpenter v. *White*, 80 F. 2d 145, certiorari denied, 297 U. S. 720	7
City Bank Farmers Trust Co., v. *Hoey*, 125 F. 2d 577	6
Koppers Coal & Transportation Co. v. *United States*, 107 F. 2d 706	6
Niagara Hudson Power Corp. v. *Hoey*, 117 F. 2d 414	6
State Street Trust Co. v. *Hassett*, 134 F. 2d 156	6
United States v. *Merchants Nat. Trust & Savings Bank*, 101 F. 2d 399	6
Weil v. *United States*, 115 F. 2d 999, certiorari denied, 313 U. S. 574	6
Statutes:	
National Industrial Recovery Act, c. 90, 48 Stat. 195, Sec. 212	9
Pub. Res. No. 36, c. 333, 49 Stat. 431	9
Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 800	8
Schedule A-3	8
Schedule A-8	9
Schedule A-9	9
Revenue Act of 1942, c. 619, 56 Stat. 957, Sec. 506	7
Miscellaneous:	
Treasury Regulations 71 (1932 ed.):	
Art. 34	10
Art. 120	10

546131—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. ——

UNITED STATES OF AMERICA, PETITIONER

v.

SEATTLE-FIRST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, entered in the above cause, affirming the judgment of the District Court of the United States for the Eastern District of Washington, Northern Division.

OPINIONS BELOW

The opinion of the district court (R. 55–76), and the opinion of the circuit court of appeals (R. 93–95) are not yet reported.

JURISDICTION

The judgment of the circuit court of appeals was entered on May 24, 1943 (R. 95). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondent (a national bank) and a state bank consolidated under the charter of respondent by written agreement therefor, ratified by their respective shareholders and approved by the Comptroller of the Currency in accordance with the National Banking Act. Legal title to all corporate securities and realty held in the state bank's name, in its own right and in fiduciary capacities, was thereby transferred to respondent. Did the transaction involve a taxable transfer of the securities and realty under the stamp-tax provisions of the Revenue Act of 1926, as amended?

STATUTE AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 8–10.

STATEMENT

Respondent, known prior to December 28, 1935 as First National Bank of Seattle, entered into a written agreement on November 26, 1935, with the Spokane and Eastern Trust Company, hereinafter called the state bank, signed by the di-

rectors of each, providing for the consolidation of the two banks under respondent's charter and the corporate name of Seattle-First National Bank. The agreement provided that (R. 49–50)—"This consolidation shall become effective when it shall have been ratified and confirmed by the affirmative vote of the holders of at least two-thirds of the shares of stock, at the time outstanding, of" both banks, "and the Comptroller of the Currency * * * shall have issued his formal certificate under the seal of his office approving such consolidation."

The state bank owned real estate, including its banking premises, as well as corporate stocks and bonds, to all of which it held legal title as a part of its corporate assets. It also held in trust certain stocks and bonds, the legal title to which was vested in it as trustee, executor, administrator, guardian, or in other fiduciary capacities. (R. 77.)

Section 5 of the agreement provided, in part, as follows (R. 29):

> All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of every kind and description of each of the consolidating associations.

The shareholders met and ratified the agreement, and on December 28, 1935, Acting Comptroller of the Currency Awalt issued a certificate

of approval, reciting that it appeared the directors and shareholders of both banks had complied with the Act of Congress, approved November 7, 1918, as amended, and therefore the banks had been consolidated under the charter of the First National Bank of Seattle and under the corporate title of Seattle-First National Bank, with an authorized capital of $8,000,000 (R. 16–18).

The findings in the pretrial order, expressly approved by counsel for the respective parties, state (R. 14):

> That the foregoing proceedings were authorized by Section 34 (a), Title 12, USCA, and resulted in the consolidation of the trust company into the plaintiff Seattle-First National Bank pursuant to the above statute, and accordingly there was effected by the agreement of November 26, 1935, and the shareholders' ratification thereof, followed by approval of the Comptroller of the Currency, a transfer of legal title to all corporate securities and real estate, legal title to which was formerly held in the name of the Spokane and Eastern Trust Company, either in its individual capacity or as a fiduciary in various capacities. No documentary stamps were purchased or affixed with respect to the transfer of legal title to such corporate securities and realty. Subsequently, a deputy collector examined the records of the bank, and as a

result, documentary stamps in the amount of $1,631.48 were purchased and affixed to the appropriate records.

This suit was brought on October 17, 1941, to recover the above tax, $1,631.48,[1] and penalty of $100 with interest. The United States filed an answer admitting parts of the complaint. A pretrial hearing resulted in the entry of an order embodying material findings of fact (R. 12–15), and the introduction of documentary exhibits, upon which the case was tried. The district court made further findings which are a repetition of the first ten paragraphs of the complaint. It entered judgment for respondent for the tax of $1,631.48 (R. 82), which was affirmed by the circuit court of appeals.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In failing to hold that the transactions involved deliveries or transfers by the State Bank to respondent of the real estate and securities, owned outright, as well as those to which it held mere legal title in fiduciary capacities, within the stamp tax provisions of the Revenue Act of 1926, as amended.

[1] The $1,631.48 tax comprised $500 paid with respect to the transferred realty (R. 5, 19–20), $457.60 with respect to securities formerly owned by the State Bank in its own right (R. 5, 21–22), and $673.88 with respect to securities held in trust (R. 5).

2. In holding that the transactions involved were not subject to the stamp-tax provisions of the Revenue Act of 1926, as amended.

3. In affirming the judgment of the district court.

REASON FOR GRANTING THE WRIT

The decision below is in conflict with *City Bank Farmers Trust Co.* v. *Hoey*, 125 F. 2d 577 (C. C. A. 2), and *State Street Trust Co.* v. *Hassett*, 134 F. 2d 156 (C. C. A. 1), in each of which it was held that a taxable transfer occurred where a bank or trust company, which had legal title to various securities, combined with another bank or trust company and the title to those securities passed to the new corporation.[2] The court below adhered to its earlier decision in *United States* v. *Merchants Nat. Trust & Savings Bank*, 101 F. 2d 399, which the First and Second Circuits, in turn, had refused to follow in the foregoing cases, and the court recognized the conflict, saying (R. 94):

> * * * The Court of Appeals of the Second Circuit in *City Bank Farmers Trust Co.* v. *Hoey*, 125 F. 2d 577, has reached a different conclusion and apparently the First Circuit has also, *State Street Trust Co.* v. *Hassett*, 134 F. 2d 156, so that if we

[2] Similar results have been reached in *Weil* v. *United States*, 115 F. 2d 999 (C. C. A. 2), certiorari denied, 313 U. S. 574; *Niagara Hudson Power Corp.* v. *Hoey*, 117 F. 2d 414 (C. C. A. 2); *Koppers Coal & Transportation Co.* v. *United States*, 107 F. 2d 706 (C. C. A. 3).

are wrong the government is in a favorable position to ask that we be set right.

Although Section 506 of the Revenue Act of 1942, c. 619, 56 Stat. 957, goes far toward clarifying the issue for the future, the question is nevertheless one of present importance since substantial amounts of taxes have been collected for 1941 and prior years which probably will be the subject of further litigation until the matter is authoritatively settled.[3]

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

CHARLES FAHY,
Solicitor General.

AUGUST 1943.

---

[3] Although the square conflict which exists as to the securities probably does not extend to the real estate, the questions are so closely related that if certiorari is granted the writ should cover the entire case. As to the real estate, compare *Carpenter* v. *White*, 80 F. 2d 145, 146 (C. C. A. 1), certiorari denied, 297 U. S. 720.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, or for or in respect of the vellum, parchment, or paper upon which such instruments, matters, or things, or any of them, are written or printed, by any person who makes, signs, issues, sells, removes, consigns, or ships the same, or for whose use or benefit the same are made, signed, issued, sold, removed, consigned, or shipped, the several taxes specified in such schedule. * * *

SCHEDULE A.—STAMP TAXES

3. [as amended by Section 723 (a) of the Revenue Act of 1932, c. 209, 47 Stat. 169] Capital stock (and similar interest), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any

paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not) * * *.

8. [as added by Section 725 of the Revenue Act of 1932] Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1934 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 * * *.

9. [as added by Section 724 (a) of the Revenue Act of 1932] Bonds, etc., sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the instruments mentioned or described in subdivision 1 and of a kind the issue of which is taxable thereunder, whether made by any assignment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such instrument or not), on each $100 of face value or fraction thereof, 4 cents * * *.

Schedule A–9 was extended by Section 212 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, and by Pub. Res. No. 36, c. 333, 49 Stat. 431.

Treasury Regulations 71 (1932 ed.):

ART. 34. *Sales or transfers subject to tax.*—The following are examples of transactions subject to the tax:

* * * * *

(b) The transfer of stock to or by trustees.

* * * * *

(r) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation, such a transfer being effected by the act of the parties and not wholly by operation of law.

* * * * *

(t) The transfer of legal title to stock irrespective of whether or not the transferee receives any beneficial interest therein, except as provided in article 35 (k).

(u) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

* * * * *

ART. 120. *Basis of tax.*—The tax accrues at the time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, the bonds, regardless of the time or manner of the delivery of the bonds or agreement or memorandum of sale. The provisions of articles 34 to 39, both inclusive, of these regulations, relating to sales or transfers of stock, are controlling also in respect of sales or transfers of bonds, in so far as consistent with the provisions of Schedule A–9 and in so far as not inapplicable to the matter of sales or transfers of bonds. * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes and regulations involved	2
Statement	2
Specification of errors to be urged	6
Summary of argument	6
Argument:	
The transfers of securities and real estate from the state bank to the respondent by virtue of their consolidation were taxable transfers within the meaning of Section 800, Schedule A-3, 8 and 9 of the Revenue Act of 1926, as amended	7
Conclusion	20
Appendix	21

CITATIONS

Cases:	
Becker v. *Bank of Commerce Liquidating Co.*, 102 F. 2d 633, certiorari denied, 308 U. S. 578	16
Burnet v. *Harmel*, 287 U. S. 103	16
Carpenter v. *White*, 80 F. 2d 145, certiorari denied, 297 U. S. 720	20
City Bank Farmers Trust Co. v. *Hoey*, 125 F. 2d 577	9, 12, 13, 14, 16, 18
Cliffs Corp. v. *United States*, 103 F. 2d 77	9, 13, 16
Founders General Co. v. *Hoey*, 300 U. S. 268	9, 10
Hofheimer v. *Seaboard Citizens Nat. Bank*, 154 Va. 392	10
Koppers Coal & Transportation Co. v. *United States*, 107 F. 2d 706	9, 13, 15
Lyeth v. *Hoey*, 305 U. S. 188	16
Niagara Hudson Power Corp. v. *Hoey*, 117 F. 2d 414, certiorari denied, 313 U. S. 571	9, 12, 13, 14, 16
Old Colony R. Co. v. *Commissioner*, 284 U. S. 552	17
Provost v. *United States*, 269 U. S. 443	8
Raybestos-Manhattan Co. v. *United States*, 296 U. S. 60	8, 13, 17
Rogers v. *Helvering*, decided December 6, 1943	16
State Street Trust Co. v. *Hassett*, 134 F. 2d 156	13, 14, 15, 16, 18
United States v. *Merchants Nat. Tr. & Sav. Bank*, 101 F. 2d 399	5, 12, 16, 17
Weil v. *United States*, 115 F. 2d 999, certiorari denied, 313 U. S. 574	9, 13, 14, 16
Worcester Na'. Bank, Ex parte, 279 U. S. 347	17

Statutes: Page

Act of November 7, 1918, c. 209, 40 Stat. 1043, as amended,
Sec. 3 (12 U. S. C. § 34a) 10, 11, 23
Revenue Act of 1926, c. 27, 44 Stat. 9:
Sec. 800 21
Schedule A–1, as amended 21
Schedule A–2, as amended 21
Schedule A–3, as amended 7, 13, 21
Schedule A–8, as amended 19, 22
Schedule A–9, as amended 7, 13, 22
Revenue Act of 1932, c. 209, 47 Stat. 169:
Sec. 1111 ..... 19, 23

Miscellaneous:

15 Fletcher *Cyclopedia Corporations*, pp. 7–12, 308 ..... 10, 11
Treasury Regulations 71 (1932 ed.):
Art. 34 ..... 11, 12, 25
Art. 35 ..... 12, 17, 18, 25
Art. 36 26
Art. 89 ..... 19, 26
Art. 120 ..... 12, 27

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 267

UNITED STATES OF AMERICA, PETITIONER

v.

SEATTLE-FIRST NATIONAL BANK, A NATIONAL BANKING ASSOCIATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the District Court (R. 55–76) is reported in 44 F. Supp. 603. The opinion of the Circuit Court of Appeals (R. 93–94) is reported in 136 F. 2d 676.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 24, 1943 (R. 94–95). The petition for a writ of certiorari was filed on August 17, 1943, and granted on October 11, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Respondent (a national bank) and a state bank consolidated under the charter of respondent by written agreement therefor, ratified by their respective shareholders and approved by the Comptroller of the Currency in accordance with the National Banking Act. Legal title to all corporate securities and realty held in the state bank's name, in its own right and in fiduciary capacities, was thereafter held by respondent. Did the transaction involve a taxable transfer of the securities and realty under the stamp-tax provisions of the Revenue Act of 1926, as amended?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved will be found in the Appendix, *infra*, pp. 21–27.

STATEMENT

Respondent, known prior to December 28, 1935, as First National Bank of Seattle, entered into a written agreement on November 26, 1935, with the Spokane and Eastern Trust Company, hereinafter called the state bank, signed by the directors of each, providing for the consolidation of the two banks under respondent's charter and the corporate name of Seattle-First National Bank (R. 43–50). The agreement provided that (R. 49–50)—"This consolidation shall become effective when it shall have been ratified and confirmed by the affirmative vote of the holders of at least two-thirds

of the shares of stock, at the time outstanding, of" both banks, "and the Comptroller of the Currency * * * shall have issued his formal certificate under the seal of his office approving such consolidation."

The state bank owned real estate, including its banking premises, as well as corporate stocks and bonds, to all of which it held legal title as a part of its corporate assets. It also held in trust certain stocks and bonds, the legal title to which was vested in it as trustee, executor, administrator, guardian, or in other fiduciary capacities. (R. 77.)

Section 5 of the agreement provided, in part, as follows (R. 29):

> All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of every kind and description of each of the consolidating associations.

The shareholders met and ratified the agreement, and on December 28, 1935, Acting Comptroller of the Currency Awalt issued a certificate of approval, reciting that it appeared the directors and shareholders of both banks had complied with the Act of Congress, approved November 7, 1918, as amended, and therefore the banks had been consolidated under the charter of the First National Bank of Seattle and under the corporate title of Seattle-First National Bank, with an authorized capital of $8,000,000 (R. 16–18).

The findings in the pretrial order, expressly approved by counsel for the respective parties, state (R. 14):

> That the foregoing proceedings were authorized by Section 34 (a), Title 12, U. S. C. A., and resulted in the consolidation of the trust company into the plaintiff Seattle-First National Bank pursuant to the above statute, and accordingly there was effected by the agreement of November 26, 1935, and the shareholders' ratification thereof, followed by approval of the Controller of the Currency, a transfer of legal title to all corporate securities and real estate, legal title to which was formerly held in the name of the Spokane and Eastern Trust Company, either in its individual capacity or as a fiduciary in various capacities. No documentary stamps were purchased or affixed with respect to the transfer of legal title to such corporate securities and realty. Subsequently, a deputy collector examined the records of the bank, and as a result, documentary stamps in the amount of $1,631.48 were purchased and affixed to the appropriate records.

This suit was brought on October 17, 1941, to recover the above tax, $1,631.48,[1] a penalty of $100, and interest (R. 2–6). The United States

[1] The $1,631.48 tax comprised $500 paid with respect to the transferred realty (R. 5, 19–20), $457.60 with respect to securities formerly owned by the state bank in its own right (R. 5, 21–22), and $673.88 with respect to securities held in trust (R. 5).

filed an answer admitting parts of the complaint (R. 7–11). A pretrial hearing resulted in the entry of an order embodying material findings of fact (R. 12–15), and the introduction of documentary exhibits, upon which the case was tried. The District Court made further findings which are a repetition of the first ten paragraphs of the complaint (R. 76–80). An opinion was filed (R. 55–76) in which the District Court stated that the decision in *United States* v. *Merchants Nat. Tr. & Sav. Bank*, 101 F. 2d 399 (C. C. A. 9), compelled it to hold that a tax was not due with respect to the securities held in trust and by analogy that a tax was likewise not due with respect to the securities which the state bank had owned beneficially (R. 62, 65). The court stated, however, that except for the compulsion of the *Merchants Nat. Bank* case it would hold the tax properly collected (R. 71). With respect to the tax on the transfer of real estate, the District Court held that the problem was different but the tax was not due (R. 72). Judgment was accordingly entered for respondent for the tax of $1,631.48 with interest (R. 82).[2] The Circuit Court of Appeals held that the case was in all respects governed by its earlier decision in the *Merchants Nat. Bank* case, and affirmed the judgment (R. 93–95).

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[2] Recovery was denied for the $100 penalty, which was paid in compromise of a threatened criminal prosecution (R. 79), on the ground that the compromise was a final settlement of the penalty (R. 75).

URGED

SPECIFICATION OF ERRORS TO BE ~~USED~~

The Circuit Court of Appeals erred:

1. In failing to hold that the transactions involved deliveries or transfers by the state bank to respondent of the real estate and securities owned outright, as well as of the securities to which it held mere legal title in fiduciary capacities, within the stamp-tax provisions of the Revenue Act of 1926, as amended.

2. In holding that the transactions involved were not subject to the stamp-tax provisions of the Revenue Act of 1926, as amended.

3. In affirming the judgment of the District Court.

SUMMARY OF ARGUMENT

This Court in construing the statute in question has noted its comprehensive terms and ruled that its scope is not to be restricted by technical refinements. In this case the consolidation agreement between the respondent and the state bank expressly provides that all assets of the state bank at the date of consolidation *shall pass to* the consolidated association, in consideration of stock in the consolidated association, or cash at the option of the shareholders of the state bank. This agreement was approved by the directors and stockholders of the state bank. The national banking act under which the consolidation was effected specifically provides that no deed or other transfer is necessary to vest title to the property

of the state bank in the national bank. Accordingly it would seem clear that under the circumstances of this case there were transfers of legal title to the securities, whether owned beneficially or held as a fiduciary, and to the real estate from the state bank to the respondent. Therefore the transfers were subject to the stamp tax under the express terms of the statute.

The Treasury Regulations support this conclusion and the weight of authority in similar and analogous cases is to the same effect.

ARGUMENT

THE TRANSFERS OF SECURITIES AND REAL ESTATE FROM THE STATE BANK TO THE RESPONDENT BY VIRTUE OF THEIR CONSOLIDATION WERE TAXABLE TRANSFERS WITHIN THE MEANING OF SECTION 800, SCHEDULE A-3, 8 AND 9 OF THE REVENUE ACT OF 1926, AS AMENDED

1. *The securities.*—Section 800, Schedule A-3 of the Revenue Act of 1926, as amended (Appendix, *infra,* pp. 21-22), imposes a stamp tax on transfers of legal title to any shares of stock or certificates, "whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate * * * or not)."

Section 800, Schedule A-9 of the Revenue Act of 1926, as amended (Appendix, *infra,* pp. 22-23),

imposes a stamp tax on all transfers of legal title to bonds, whether made by any assignment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such instrument or not).

The comprehensiveness of this language has been given literal application by this Court. In applying the statute to transactions necessarily involved in short sales in *Provost* v. *United States*, 269 U. S. 443, this Court said (p. 458):

> It [the statute] evidenced a purpose not only to tax all sales or agreements to sell which had been previously taxed, but to extend the taxing provision to all transfers of legal title to shares or certificates whether technical sales or not. * * *

In *Raybestos-Manhattan Co.* v. *United States*, 296 U. S. 60, this Court upheld a stamp tax [3] upon the receipt by the stockholders of shares in a new corporation resulting from a reorganization, and in its opinion this Court said (pp. 62, 63):

> The stock transfer tax is a revenue measure exclusively. Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another. * * *
>
> * * * * *

[3] This was in addition to the tax on the original issue of the stock, liability for which was conceded (296 U. S. 60, 62).

> The reach of a taxing act whose purpose is as obvious as the present is not to be restricted by technical refinements. * * *

In *Founders General Co.* v. *Hoey*, 300 U. S. 268, this Court upheld the imposition of a stamp tax upon the transfer of stock from a stockholder to his nominee, and in its opinion said (p. 275) that—

> * * * we are not to look beyond the Act for further criteria of taxability.

The circuit courts of appeals have also emphasized the broad language of the statute. In *Weil* v. *United States*, 115 F. 2d 999 (C. C. A. 2), certiorari denied, 313 U. S. 574, the court said (p. 1002):

> The Supreme Court construed the statute imposing the transfer tax literally in *Raybestos-Manhattan, Inc.*, v. *United States*, 296 U. S. 60 * * * and *Founders General Corp.* v. *Hoey*, 300 U. S. 268 * * * and was altogether strict in subjecting the transfers to a tax.

See also *City Bank Farmers Trust Co.* v. *Hoey*, 125 F. 2d 577, 578 (C. C. A. 2); *Niagara Hudson Power Corp.* v. *Hoey*, 117 F. 2d 414, 416 (C. C. A. 2), certiorari denied, 313 U. S. 571; *Cliffs Corp.* v. *United States*, 103 F. 2d 77, 79, 80 (C. C. A. 6); *Koppers Coal & Transportation Co.* v. *United States*, 107 F. 2d 706, 708 (C. C. A. 3).

In this case, the consolidation or merger[4] effected transfers of legal title to the securities, formerly held by the state bank either in its own name or as a fiduciary,[5] to respondent. The agreement expressly provides that all assets of each party at the date of consolidation *shall pass to* the consolidated association (R. 29, 47). The record shows that the agreement of consolidation was submitted to a special meeting of the board of directors of the state bank on November 26, 1935, at which time the agreement for consolidation was read and a resolution was passed authorizing the state bank to enter into the agreement and its officers to execute such agreement, and calling a special meeting of stockholders on December 24, 1935, for the purpose of ratifying and confirming

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[4] Section 3 of the Act of November 7, 1918, as amended (Appendix, *infra*, pp. 23–24) under which the consolidation or merger was effected, provides for a "consolidation" in which the "constituent" banks shall be "merged into and continued in the consolidated national banking association" which shall "be deemed to be the same corporation as each of the constituent institutions." The language, speaking of both consolidation and merger, is inconclusive as to whether the reorganization is a consolidation or merger, but as the constituent institutions continue in the form of the surviving corporation instead of expiring to be replaced by a new corporation the reorganization resembles a true merger rather than a true consolidation. *Hofheimer* v. *Seaboard Citizens Nat. Bank*, 154 Va. 392, 397, 153 S. E. 656; see 15 Fletcher *Cyclopedia Corporations*, pp. 7–12, 308.

[5] The reach of the tax is not restricted to transfers of beneficial interests. *Founders General Co.* v. *Hoey*, *supra*, at p. 274.

the agreement (R. 23–36). Another resolution was passed by the board of directors appointing a committee to certify the acceptability of the assets to be contributed by each of the merging banks (R. 37). The record also shows that the stockholders of the state bank at the special meeting held on December 24, 1935, ratified and confirmed this agreement (R. 38–53). In these circumstances, it would seem to be clear that there were transfers of legal title to the securities of the state bank at the time of consolidation or merger and that such transfers are subject to stamp tax under the express terms of Section 800, Schedule A–3 and 9.[6]

The Treasury Regulations support this conclusion. Article 34 (r) of Treasury Regulations 71 (Appendix, *infra*, p. 25) provides that upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation, is subject to the tax.[7] We

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[6] Under Section 3 of the 1918 Act as amended (Appendix, *infra*, pp. 23–24) also, the effect of the consolidation or merger was to transfer the property to the national bank.

[7] As noted in footnote 4, *supra*, p. 10, the instant reorganization resembles a merger more than a consolidation so it would appear to come precisely within this regulation. The case does not rest on this, however; a regulation stating a merger to be a taxable transfer was doubtless deemed necessary because in a true merger the merging corporations continue in the surviving corporation (Fletcher, *op. cit.* footnote 4, p. 10), thus laying the foundation for a technical argument against there being a "transfer." In a true consolida-

need not now contest the decision (*City Bank Farmers Trust Co.* v. *Hoey, supra*) that this regulation applies only to stock *beneficially* owned by the corporation, for with respect to the stock held in trust by the state bank and transferred to respondent, Article 34 (b) of Treasury Regulations 71 (Appendix, *infra*, p. 25) provides that the transfer of stock *by* trustees is subject to the tax.

Under Article 120 of Treasury Regulations 71 (Appendix, *infra*, p. 27), the Regulations relating to transfers of stocks are controlling in respect of transfers of bonds.

The court below held, however, in reliance upon its earlier decision in *United States* v. *Merchants Nat. Tr. & Sav. Bank*, 101 F. 2d 399, that these transfers were exempt because they resulted "wholly by operation of law" within the meaning of Article 35 (r) (Appendix, *infra*, p. 26). The court reasoned that because no deed, assignment or other instrument was executed, because the certificates were not endorsed[*] and there was not any delivery or change of possession other than that which may be implied from the consol-

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tion, however, the old corporations expire and a new one appears (*id.*) so the existence there of a transfer is by contrast *a fortiori* (see *Niagara Hudson Power Corp.* v. *Hoey*, 117 F. 2d 414 (C. C. A. 2) certiorari denied, 313 U. S. 571), thus obviating the need for an interpretative regulation.

[*] The record does not show that the certificates were not endorsed.

idation, the transfers occurred by operation of law. But inasmuch as the directors and stockholders of both banks acted upon the consolidation agreement, the consolidation or merger was effected by the act of the parties and not by operation of law. The fact that there was no deed or other instrument to transfer the property in question is immaterial (*Raybestos-Manhattan Co.* v. *United States, supra*), because Section 800, Schedule A–3 and 9, expressly imposes the tax on transfers of legal title whether made upon any paper or memorandum *or other evidence of transfer.* In this case the agreement of consolidation which was approved by the directors and ratified by the stockholders was the memorandum or other evidence of transfer (R. 23–53). Cf. *Raybestos-Manhattan Co.* v. *United States, supra.* That no formal assignment is necessary is shown by the following authorities: *Raybestos-Manhattan Co.* v. *United States, supra; Weil* v. *United States,* 115 F. 2d 999 (C. C. A. 2), certiorari denied, 313 U. S. 574; *Koppers Coal & Transportation Co.* v. *United States,* 107 F. 2d 706 (C. C. A. 3); *Niagara Hudson Power Corp.* v. *Hoey,* 117 F. 2d 414 (C. C. A. 2), certiorari denied, 313 U. S. 571; *State Street Trust Co.* v. *Hassett,* 134 F. 2d 156 (C. C. A. 1); *City Bank Farmers Trust Co.* v. *Hoey,* 125 F. 2d 577 (C. C. A. 2); and *Cliffs Corp.* v. *United States,* 103 F. 2d 77 (C. C. A. 6).

The decisions of other circuit courts of appeals support our contention that mergers and consolidations do not occur wholly by operation of law.[9] In *City Bank Farmers Trust Co.* v. *Hoey, supra,* a trust company holding stock in trust[10] was merged under the banking law of New York with another trust company, and legal title to the stock held in trust was transferred to the other company. The court held that there was a transfer of the stock held in trust under Section 800, Schedule A–3, of the Revenue Act of 1926, as amended. *Niagara Hudson Power Corp* v. *Hoey, supra,* involving the consolidation of two corporations under the New York stock corporation law, is to the same effect. In that case the court said (p. 416):

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[9] *Weil* v. *United States, supra,* which carries the exemption accorded by the Regulations to transfers by operation of law to, and perhaps even beyond, the farthest permissible extent, will serve for present purposes to illustrate the difference between a taxable transfer and one by operation of law. A take-over by the New York State Superintendent of Insurance, later succeeded by the Mortgage Commission, was held an exempt transfer by operation of law. A subsequent transfer of the assets (securities) by the Mortgage Commission to new trustees selected by the investors on the consent of two-thirds, was held not to be by operation of law and therefore to be taxable.

[10] With respect to stock held by the merged trust company as custodian, the court held that there was no taxable transfer. A similar ruling was made in *State Street Trust Co.* v. *Hassett,* 134 F. 2d 156 (C. C. A. 1). In this case none of the securities involved was held as custodian.

> Indeed, it is said, a transfer is inconceivable, for there were no instruments of transfer, nor was there any moment of time at which a transferor and a transferee were co-existent. But in legal jargon a change of ownership, terminating rights and other relations in one entity and creating them in another, is the essence of "transfer," * * *.

In *State Street Trust Co.* v. *Hassett,* 134 F. 2d 156 (C. C. A. 1), two state banks merged under the law of Massachusetts and one of the banks transferred to the other securities which it held both in its own right and in a fiduciary capacity. The transfers were held subject to the documentary stamp taxes under Section 800, Schedule A–3 and 9, of the Revenue Act of 1926, as amended.

Koppers Coal & Transportation Co. v. *United States, supra,* involved the consolidation of two corporations under the law of Delaware. In that case the transfer of stock owned by one of the corporations to the surviving corporation was held a taxable transfer under Section 800, Schedule A–3, of the Revenue Act of 1926, as amended. In that case the court said (p. 708):

> In short, the underlying property of the constituent corporations is transferred to the resultant corporation upon the carrying out of the consolidation or merger as provided by Section 59.
>
> Such a transfer of title is within the express language of Schedule A (3) of Sec-

> tion 800 and is precisely the example given in Article 34 (r) of Treasury Regulations 71. The transfer of the stock from Koppers Coal & Transportation Company to C. C. B. Smokeless Coal Company was not "wholly by operation of law" since the voluntary act and participation of the constituent companies was required in order to effect the merger or consolidation.

See also *Cliffs Corp.* v. *United States,* 103 F. 2d 77 (C. C. A. 6), and *Becker* v. *Bank of Commerce Liquidating Co.,* 102 F. 2d 633 (C. C. A. 8), certiorari denied, 308 U. S. 578.

The *Merchants Nat. Bank* case, *supra,* erroneously relied upon technicalities of California law to support the conclusion that the transfers resulted wholly by operation of law. The fact that a state may treat a certain transaction as being by "operation of law" does not control the application of a Federal Revenue Act. *Rogers* v. *Helvering,* No. 66, decided December 6, 1943; *Burnet* v. *Harmel,* 287 U. S. 103, 110; *Lyeth* v. *Hoey,* 305 U. S. 188, 193; *Weil* v. *United States, supra; Niagara Hudson Power Corp.* v. *Hoey, supra; Cliffs Corp.* v. *United States, supra; Becker* v. *Bank of Commerce Liquidating Co.,* 102 F. 2d 633 (C. C. A. 8), certiorari denied, 308 U. S. 578; *State Street Trust Co.* v. *Hassett, supra; City Bank Farmers Trust Co.* v. *Hoey, supra.*

The statute authorizing the consolidation of respondent and the state bank provides in part that upon such a consolidation the consolidated asso-

ciation "shall be deemed to be" the same corporation as each of the constituent institutions. This Court has referred to the consolidation as accomplishing a transfer and has decided that the consolidated association cannot act in the name of one of its constituents as an executor without applying to the proper tribunal to be substituted for the constituent. *Ex parte Worcester Nat. Bank,* 279 U. S. 347. In any event what is "deemed to be" the situation for banking purposes does not foreclose an inquiry into the realities of the situation for tax purposes. See *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 562. This taxing act is "not to be restricted by technical refinements." *Raybestos-Manhattan Co.* v. *United States, supra,* at p. 63.

In the *Merchants Nat. Bank* case the court below rested its decision upon the ground that the exemption of these transfers was justified by Article 35 (h) of the Treasury Regulations. (Appendix, *infra,* p. 25). That provision deals with transfers from the name of a deceased or resigned trustee to the name of a substituted trustee "appointed in accordance with the terms of the original trust agreement." The decision below relies upon the *Merchants Nat. Bank* decision, but does not specifically mention why it extended that decision to transfers of beneficially owned securities and real property. Neither of the cases actually involved a deceased or resigned trustee, but the *Merchants Nat. Bank* case held that Article 35 (h)

is not to be strictly construed, but instead is to be given a "plain commonsense" meaning broad enough to include the change of trustees which occurs upon a consolidation. The Second Circuit in the *City Bank Farmers Trust Co.* case disagreed with such an approach to the problem, and held (p. 579) that it had "no power to extend by analogy such a regulation [11] under a statute which itself is to be strictly construed." [12] We submit that the *City Bank Farmers Trust Co.* decision correctly interprets the regulations and that the exemptions in the Regulations themselves represent the utmost degree of magnanimity which the statute justifies and therefore must be strictly confined to the fields which they cover.

In any event there is a clear distinction between a transfer "from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement" and a transfer which results from a consolidation or merger. The latter is a transfer for its own business reasons from one professional trustee to another, wholly voluntary and hence a far cry from the transfers by operation of law which Article 35 (h) specifically states it means to exempt.

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[11] The court was there considering Treasury Regulations 71, as in effect in an earlier year, 1931. The language of the 1932 edition of the Regulations involved here is identical.

[12] Accord, *State Street Trust Co.* v. *Hassett*, 134 F. 2d 156 (C. C. A. 1).

2. *The real property.*—With respect to the real estate transferred by the state bank to respondent, Section 800, Schedule A–8, of the Revenue Act of 1926, as amended (Appendix, *infra*, p. 22) imposes a stamp tax on a deed, instrument, or writing whereby any lands or other realty sold shall be transferred or conveyed to the purchaser. In determining whether property was "transferred" the same principles should apply as in the case of the securities. And the agreement of consolidation, an instrument in writing, transferred the real estate, thus satisfying the requirements of Section 800, Schedule A–8, of the Revenue Act of 1926, as amended, and making clear that the transfer of the real estate was not made wholly by operation of law.

Since the statute refers in terms to land "sold" to a "purchaser," the question remains whether respondent was a purchaser under the circumstances of this case. The transfer of property, including realty, from the state bank to respondent was made in consideration of stock or cash, depending upon the election of the stockholders of the state bank (R. 30, 48). Article 89 of Treasury Regulations 71 (Appendix, *infra*, pp. 26–27) provides that stock in a corporation is a valuable consideration for the transfer of real property. While respondent is an association, not a corporation, it comes within the statutory definition of corporation in Section 1111 (2) (Appendix, *infra*, p. 23) of the Revenue Act of 1932. Since there

was a change of ownership, we submit that respondent is a purchaser within the meaning of the statute.

In *Carpenter* v. *White,* 80 F. 2d 145 (C. C. A. 1), certiorari denied, 297 U. S. 720, a business trust and a corporation conveyed by deed all of their realty to another business trust organized to absorb the properties and the business of the two units, which received in return a pro rata portion of shares in the new business unit. The court held that a taxable transfer occurred under Section 800, Schedule A–5, of the Revenue Act of 1924, which corresponds to Section 800, Schedule A–8, of the Revenue Act of 1926, as amended. The instant case should, we submit, be similarly decided.

CONCLUSION

The decision of the court below, which is contrary to the weight of authority, incorrectly applied the statute and the regulations and accordingly should be reversed.

Respectfully submitted.

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DECEMBER 1943.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 800. On and after the expiration of thirty days after the enactment of this Act there shall be levied, collected, and paid, for and in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters, and things mentioned and described in Schedule A of this title, * * * * * *

SCHEDULE A.—STAMP TAXES

1. [as amended by Section 721 of the Revenue Act of 1932, c. 209, 47 Stat. 169] Bonds of indebtedness. On all bonds, * * *.

2. [as amended by Section 722 of the Revenue Act of 1932] Capital Stock (and similar interests), issue: On each original issue, * * *.

3. [as amended by Section 723 (a) of the Revenue Act of 1932] Capital stock (and similar interests), sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the shares or certificates mentioned or described in subdivision 2, or to rights to subscribe for or to receive such shares or certificates, whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer

or sale (whether entitling the holder in any manner to the benefit of such share, certificate, interest, or rights, or not), on each $100 of par or face value or fraction thereof of the certificates of such corporation * * *, 4 cents, * * * * * *

8. [as added by Section 725 of the Revenue Act of 1932, and as amended by Section 212 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431] Conveyances: Deed, instrument, or writing, delivered on or after the 15th day after the date of the enactment of the Revenue Act of 1932 and before July 1, 1937 (unless deposited in escrow before April 1, 1932), whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers, or any other person or persons, by his, her, or their direction, when the consideration or value of the interest or property conveyed, exclusive of the value of any lien or encumbrance remaining thereon at the time of sale, exceeds $100 and does not exceed $500, 50 cents; and for each additional $500 or fractional part thereof, 50 cents. * * *

9. [as added by Section 724 (a) of the Revenue Act of 1932, and as amended by Section 212 of the National Industrial Recovery Act, and as amended by Pub. Res. No. 36] Bonds, etc., sales or transfers: On all sales, or agreements to sell, or memoranda of sales or deliveries of, or transfers of legal title to any of the instruments mentioned or described in subdivision 1 and of a kind the issue of which is taxable thereunder, whether made by any assign-

ment in blank or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such instrument or not), on each $100 of face value or fraction thereof, 4 cents: * * *.

Revenue Act of 1932:

Section 1111.—

* * * * *

(2) The term "corporation" includes associations, joint-stock companies, and insurance companies.

Act of November 7, 1918, c. 209, 40 Stat. 1043, Sec. 3, as added by the Act of February 25, 1927, c. 191, 44 Stat. 1224, Sec. 1, and as amended by the Banking Act of 1933, c. 89, 48 Stat. 162, Sec. 24, and the Banking Act of 1935, c. 614, 49 Stat. 684, Sec. 331:

SEC. 3. That any bank incorporated under the laws of any State, or any bank incorporated in the District of Columbia, may be consolidated with a national banking association located in the same State, county, city, town, or village under the charter of such national banking association on such terms and conditions as may be lawfully agreed upon by a majority of the board of directors of each association or bank proposing to consolidate, and which agreement shall be ratified and confirmed by the affirmative vote of the shareholders of each such association or bank owning at least two-thirds of its capital stock outstanding, or by a greater proportion of such capital stock in the case of such State bank if the laws of the State where the same is organized so require,

at a meeting to be held on the call of the directors after publishing notice of the time, place, and object of the meeting * * * * * * Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 1 of this Act, the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions. All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging, shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation * * *. [12 U. S. C. § 34a.]

Treasury Regulations 71 (1932 ed.):

ART. 34. *Sales or transfers subject to tax.*—The following are examples of transactions subject to the tax:

(a) The sale or transfer of shares of stock, whether or not represented by certificates.

(b) The transfer of stock to or by trustees.

* * * * *

(r) Upon a merger, the transfer of stock owned by a corporation which is merged into another corporation from the name of the first to the name of the second corporation, such a transfer being effected by the act of the parties and not wholly by operation of law.

* * * * *

(t) The transfer of legal title to stock irrespective of whether or not the transferee receives any beneficial interest therein, except as provided in article 35 (k).

(u) Transfer of stock from old firm to new firm succeeding to its business where personnel is different.

* * * * *

ART. 35. *Sales or transfers not subject to tax.*—The following are examples of transactions not subject to the tax:

* * * * *

(h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law.

* * * * *

(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor.

* * * * * *

ART. 36. *Memoranda of sales.*—Every person who makes an agreement to sell or transfers title to shares of stock by delivery of certificates assigned in blank, including every person who lends stock, shall, as a part of such transaction, promptly make and deliver to the buyer or borrower a bill or memorandum of such sale, agreement to sell, or loan, duly signed by the seller or lender or his agent, to which the requisite stamps shall be affixed and canceled, which bill or memorandum shall show the date of the transaction, the names of the seller and buyer, or lender and borrower, and the name and number of shares of stock, and the tax paid thereon, and in the case of a transaction made on an exchange shall bear a number upon the face thereof and have printed or written in ink thereon the words "Subject to the Revenue Act of 1926, as amended, and regulations made in accordance therewith." No more than one such bill or memorandum made by the seller or lender on any given date shall bear the same number. However, no single transaction or purchase or sale that is made upon an exchange by one member to another member shall be required to be evidenced by more than one stamped memorandum.

ART. 89. *Stock in corporation a valuable consideration.*—Stock in a corporation is a

valuable consideration for the transfer of real property.

ART. 120. *Basis of tax.*—The tax accrues at the time of making the sale or agreement to sell or memorandum of sale, or delivery of, or transfer of the legal title to, the bonds, regardless of the time or manner of the delivery of the bonds or agreement or memorandum of sale. The provisions of articles 34 to 39, both inclusive, of these regulations, relating to sales or transfers of stock, are controlling also in respect of sales or transfers of bonds, insofar as consistent with the provisions of Schedule A–9 and insofar as not inapplicable to the matter of sales or transfers of bonds.

Loans of bonds and the return of bonds loaned are subject to tax.

A bill or memorandum, such as provided in article 36, is required in respect of every sale or transfer of a bearer bond.

* * * * *

U. S. GOVERNMENT PRINTING OFFICE: 1943

FILE COPY

The Supreme Court of the United States

October Term, 1943

No. 267

UNITED STATES OF AMERICA,
Petitioner

v.

SEATTLE-FIRST NATIONAL BANK,
a National Banking Association

Respondent's Brief in Opposition to Petition for Writ of Certiorari

B. H. KIZER
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Counsel for Respondent.

SUBJECT INDEX

	Page
Statement	1
Argument	2
Conclusion	9

TABLE OF CASES CITED

	Page
Burke v. United States, 58 Fed. (2) 739	5
City Bank Farmers Trust Company v. Hoey, 125 Fed. (2) 577 (C. C. A. 2)	2
Metropolitan National Bank v. Claggett, 141 U. S. 520	5
Michigan Insurance Bank v. Eldred, 143 U. S. 293	5
People's National Bank v. Board of Commissioners, 103 Pac. (Okla.) 682	5
Raybestos-Manhattan Co. v. United States, 296 U. S. 60	7
State Street Trust Company v. Hassett, 134 Fed. (2) 156, (C. C. A. 1)	2-3-7
Weil v. United States, 155 Fed. (2) 999	3

TABLE OF STATUES CITED

	Page
Revenue Act of 1926, Title VIII	2
Revenue Act of 1926, c. 27, 44 Stat. 9: Sec. 800	
Schedule A-3	8
Schedule A-8	8
Schedule A-9	8
Revenue Act of 1942, c. 619, 56 Stat. 957, § 506	9
National Bank Act, Title XII, U. S. C. A. § 34a	4
33	4
35	4

MISCELLANEOUS

	Page
Treasury Regulations 71 (1928 ed.):	
Art. 35 (h)	3
Art. 35 (q)	2
Treasury Regulations 71 (1932 ed.):	
Art. 35 (h)	8
Art. 35 (r)	8
Art. 91	3
Art. 106	3

The Supreme Court of the United States

No. 267 October Term, 1943

UNITED STATES OF AMERICA,
Petitioner

v.

SEATTLE-FIRST NATIONAL BANK,
a National Banking Association

Respondent's Brief in Opposition to Petition for Writ of Certiorari

STATEMENT

Respondent is a national banking association incorporated under Section 34a of the National Bank Act (U. S. C. A., Title XII, § 34a) by the consolidation of a state and national bank (R. 16, 77, 93). Since the act prescribes the continuity of corporate existence and identity of the participants and specifically dispenses with the necessity for conveyances or instruments of transfer, no deed, assignment or other instrument was in fact executed to transfer the real estate, stocks, bonds or other property whether owned outright or held in some fiduciary capacity. The certificates of stock were not endorsed and there was no delivery or change of possession (R. 77, 94).

Notwithstanding the peculiar pains taken by Congress to prescribe and define the legal effect of such a consolidation, the collector of internal revenue insisted

that it was nothing but a merger of the state bank into the national bank similar in all respects to a merger under the statutes of New York or Massachusetts (R. 19-23). Upon this assumption he determined that the respondent had acquired its banking quarters, bonds constituting its capital assets and stock and bonds held in different trust accounts by conveyances and transfers liable to documentary stamp taxes under Title VIII of the Revenue Act of 1926.

The same theory was urged upon the District Court and the Circuit Court of Appeals. It is now presented by the petition for certiorari as the basis for the claimed conflict in decision between the Circuits.

ARGUMENT

The reason given for granting the writ is that the decision below is in conflict with City Bank Farmers Trust Company v. Hoey, 125 Fed. (2) 577 (C. C. A. 2), and State Street Trust Company v. Hassett, 134 Fed. (2) 156 (C. C. A. 1). But whatever the diversity of language no conflict in fact exists except upon the theory that a consolidation under the National Bank Act is identical with a merger under the New York and Massachusetts statutes.

City Bank Farmers Trust Company v. Hoey, 125 Fed. (2) 577, determined that assets held in trust by Bank of America Trust Company were transferred to City Bank Farmers Trust Company upon the merger of the former into the latter under authority of the New York statutes, Article 35 (q), exempting transfers by operation of law (Article 35 (r) 1932) and Article

35 (h), exempting transfers from a deceased or resigned trustee to his successor (Article 35 (h) 1932), were held inapplicable.

State Street Trust Company v. Hassett, 134 Fed. (2) 156, decided that the same regulations in their 1932 form (Articles 35 (h) and 35 (r) did not exempt transfers of securities held in trust by Union Trust Company of Boston to State Street Trust Company upon the merger of the former into the latter under authority of the Massachusetts statutes.

Both these cases and Weil v. United States, 155 Fed. (2) 999, refused to accept the statutes and decisions of New York and Massachusetts as conclusive that such transfers were by operation of law.

Of course, these cases decide merely that securities transferred by a trustee to its successor are not exempted from tax by two particular articles of the regulations. Consequently they cannot be said to conflict with the present decision in so far as it deals with owned assets and especially real estate, *even if it be assumed that the mergers involved in those cases are identical with a consolidation.

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* Real Estate. The language of Schedule A-8 imposing a documentary stamp tax upon conveyances is startlingly different from the language of Schedules A-3 and A-9 imposing the tax upon transfers of stocks and bonds. Abbreviated slightly, it is:

"8. Conveyances: Deed, instrument, or writing, delivered . . ., whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers . . ."

The tax is not upon the sale, not upon the transfer, but upon the instrument of conveyance. Also the deed must be an instrument of conveyance effective under general law to vest title in and of itself. The regulations so interpret the language of the statute. Thus an option to purchase real estate or a contract to sell real estate is not taxable unless they vest title. (Articles 91 and 106)

We will discuss the difference between mergers under state statutes and a consolidation under the National Bank Act at this point and return to the other point further along.

A national banking association is not an ordinary bank. It is the peculiar creature of the National Bank Act created to be an agency of the national government and regulated and controlled by Congress for national purposes. Congress has power to impose such burdens and duties and to accord such privileges and immunities as are appropriate to accomplish its purpose. Particularly, Congress has plenary power to prescribe the conditions, formalities, incidents and legal effect of their formation.

These self-evident propositions are mentioned merely to point the difference between the formation of a state bank and a national bank. Congress has power to dispense with the taxable incidents of a given transaction whether a state legislature has or not. The conclusion that the law of Massachusetts or New York could not exempt from federal taxation transfers incident to a merger does not conflict with the conclusion reached in this case.

Examination of the National Bank Act discloses that national banks may be formed out of existing institutions in three ways set forth in §§ 35, 33 and 34a of Title XII, U. S. C. A. Section 35, Act of June 3, 1864, as amended, authorizes the conversion of a state bank into a national banking association. Section 33, Act of

November 17, 1918, as amended, authorizes the consolidation of two or more national banking associations into one association, and Section 34a, Act of February 25, 1927, as amended, authorizes the consolidation of a state bank and a national banking association. In each case the essential requirements are: The affirmative vote of shareholders, the execution of articles of association or an agreement by the directors and approval by the Comptroller of the Currency.

In Metropolitan National Bank v. Claggett, 141 U. S. 520, it was stated that a conversion of a state bank into a national banking association results in a continuation of the same body with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction. It remains one and the same bank and goes on doing business uninterruptedly. To the same effect see

Michigan Insurance Bank v. Eldred, 143 U. S. 293;

Burke v. United States, 58 Fed. (2) 739;

People's National Bank v. Board of Commissioners, 103 Pac. (Okla.) 682.

Formation of a single association by the consolidation of existing associations or state banks under §§ 33 or 34a are attended with the same results as the formation of an association by conversion; that is to say, there is a continuation of the same body, with the same officers and stockholders, the same property, assets and banking business under a changed jurisdiction. The banks remain the same and go on doing business

uninterruptedly. The applicable portion of §34a is quoted in the margin.*

In brief, national banking associations are formed out of existing institutions whether one or many, state or national, by a procedure substantially identical and with identical effect, namely, the corporate existence is not destroyed but continues, the banking business goes on without interruption, the property, assets and business are not transferred but retained.

If respondent is "deemed to be the same corporation" and "holds and enjoys the same rights of property in the same manner and to the same extent" as the Spokane and Eastern Trust Company "by virtue of the consolidation" alone "without any deed or other transfer" and without other action on any one's part, then there has been no transfer of titles. The Spokane and Eastern Trust Company under another name and

---

* ". . . Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of each of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions.

"All the rights, franchises, and interests of each of such constituent banks and national banking associations in and to every species of property, real, personal, and mixed, and choses in action thereto belonging shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises, and interests, including appointments, designations, and nominations and all other rights and interests as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation . . ."

under another jurisdiction is continuing the same banking business in the same place with the same assets, the same rights of property and subject to the same liabilities. It has not sold or transferred its assets—it has changed its name and subjected itself to the supervision of the federal government. There has no more been a transfer of assets than there would have been if the Spokane and Eastern Trust Company had converted into a national banking association.

With this simple system devised by Congress to encourage the conversion and the consolidation of state banks into national banking associations contrast a merger under state statutes such as that in State Street Trust Company v. Hassett, 134 Fed. (2) 156. We quote from page 157:

> "In July, 1936, the Union Trust Company of Boston, hereafter called 'Union,' was merged into the taxpayer, State Street Trust Company, hereafter called 'State,' both Massachusetts corporations, in accordance with the terms of a written agreement previously entered into by the two companies. By a bill of sale and acknowledgment of liability, Union sold, assigned, transferred and delivered to State all of its assets and property . . ."

It is scarcely possible to find a conflict between decisions on two such dissimilar situations. Likewise it is difficult to point to anything which can be called a sale or transfer of any asset of one bank to another in a consolidation under the National Bank Act. There is a complete absence of that "relinquishment of ownership" by one "for the benefit of another" and "the resultant acquisition of it by him" which in the language of this court in Raybestos-Manhattan Co. v. United

States, 296 U. S. 60, 63, "calls the statute into operation."

In the present case the documentary stamp tax was collected under authority of Schedules A-3, A-8 and A-9, Sec. 800 of the Revenue Act of 1926, c. 27, 44 Stat. 9, as amended and in force on December 28, 1935. The petition for certiorari omits the articles of Regulations 71 (1932 edition) discussed in this and the two cases with which conflict is claimed. They are Article 35 (h), interpreting the act as exempting transfers of securities from the name of a deceased or resigned trustee to his successor, and Article 35 (r), likewise interpreting the act as exempting transfers by operation of law. These two articles are printed in the margin.*

As we pointed out above, the cases in the First and Second Circuits discussing transfers of trust assets pursuant to mergers under the New York and Massachusetts statutes do not consider transfers of owned assets. In the present case the court was called upon to consider a tax upon the claimed transfer of owned assets, both real estate and personal property (banking quarters and bonds in capital account), in addition to trust assets. Necessarily the only possible conflict can be in respect to one of these three, namely, the

---

* "Article 35. Sales or transfers not subject to tax.—The following are examples of transactions not subject to the tax:

"(h). The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

"(r). Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfers of stock from decedent to executor."

trust assets. Even this possible conflict has been removed by § 506 of the Revenue Act of 1942, c. 619, 56 Stat. 957, providing that transfers by operation of law shall not be exempt unless otherwise exempted but specifically exempting transfers from trustees to surviving, substituted, succeeding or additional trustees of the same trust. It scarcely needs remark that under the Revenue Act of 1942 the trust assets claimed to have been transferred in the present case and in the cases of the First and Second Circuits would be exempt from tax.

CONCLUSION

It is accordingly respectfully submitted that the decisions of the courts below in the present case are manifestly correct for the reason that a consolidation under the National Bank Act cannot because of its nature involve a sale or transfer upon which documentary stamp taxes are imposed by Title VIII of the Revenue Act of 1926. Secondly that the decisions in the Second and First Circuits are upon totally different facts and therefore no conflict exists requiring a review of the decision in this case upon writ of certiorari.

Respectfully submitted,

B. H. KIZER,
ARNOLD L. GRAVES,
Counsel for Respondent.

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No. 267

The Supreme Court of the United States

October Term, 1943

UNITED STATES OF AMERICA, *Petitioner*

v.

SEATTLE-FIRST NATIONAL BANK,
a National Banking Association

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

INDEX

	Page
Question presented	1
Statement	1
Argument:	
I. The National Bank Act	5
II. Documentary Stamp Taxes Under the Revenue Act of 1926, as Amended	13
III. Regulations 71, Relating to Stamp Taxes Under Title VIII of the Revenue Act of 1926, as Amended	15
IV. Cases Cited	25
V. Conclusion	26

CITATIONS

Cases:	Page
Adams v. *Nagle*, 303 U. S. 532	13, 18, 19
Carpenter v. *White*, 40 Fed. (2), 145	25
City Bank Farmers Trust Co. v. *Hoey*, 125 Fed. (2) 575	16, 20
Dixon v. *Cannon*, 32 Fed. Sup. 626; 115 Fed. (2) 913	12
First National Bank v. *Fellows*, 244 U. S. 416	6
Haggar Co. v. *Helvering*, 308 U. S. 389	5
Helvering v. *Reynolds Tobacco Co.*, 306 U. S. 110	23
Helvering v. *Wilshire Oil Co.*, 308 U. S. 90	23
Hightower v. *American Nat'l Bank*, 263 U. S. 351	13
Hofheimer v. *Seaboard Citizens Nat'l Bank*, 154 Va. 392, 153 S. E. 656	6
Koppers Coal & Trans. Co. v. *U. S.*, 107 Fed. (2) 706	25
McCulloch v. *Maryland*, 4 Wheat. 315	6
Metropolitan Nat'l Bank v. *Claggett*, 141 U. S. 520	8
National Lead Co. v. *U. S.*, 252 U. S. 140	23
Raybestos-Manhattan Co. v. *U. S.*, 296 U. S. 60	14, 21
State Street Trust Company v. *Hassett*, 134 Fed. (2) 156	20, 26
United States v. *Merchants Nat'l Trust & Savings Bank*, 101 Fed. (2) 399	4, 26
United States v. *Winston*, 170 U. S. 522	5
Worcester Nat'l Bank, Ex parte, 279 U. S. 347	6

Statutes:	Page
Act of November 7, 1918, 12 U. S. C. A.	7
§ 21	6
§ 22	6
§ 23	6
§ 27	6, 7
§ 28	6
§ 33	7, 8
§ 34	8
§ 34a	1, 2, 7, 8, 9, 18
§ 35	7, 8
War Revenue Act of 1917, (Act of Oct. 3, 1917; 40 Stat. 319 Schedule A-7	22
Revenue Act of 1918 (Act of Feb. 24, 1919; 40 Stat. 1057) Schedule A-7	22
Revenue Act of 1926, Title VIII	13, 15
§ 800, Schedule A-3	14, 15
Schedule A-8	14, 16, 21
Schedule A-9	14, 15
Revenue Act of 1942, c. 619, 56 Stat. 957	20
Miscellaneous:	
Congressional Record, Vol. 77, Part 4, pp. 3227, 3827 and 3840	6
Treasury Regulations 55 (Revised October 1920)	23
Treasury Regulations 55 (Revised July 3, 1924)	23
Treasury Regulations 71 (1932 ed.)	16
Chapter III, Art. 31	16
Art. 34	16, 17
Art. 35	16, 17
Art. 35 (h)	19, 20, 26
Art. 35 (m)	17
Art. 35 (n)	17
Art. 35 (r)	17, 26
Art. 36	16
Art. 37	16
Art. 38	16
Chapter VIII, Art. 75	22, 27, 28
Art. 79	22, 27, 28
Art. 84	22, 27, 28
Art. 91	22, 27, 28
Art. 92	22, 27, 28
Art. 100	22, 27, 28
Art. 101	22, 27, 28
Art. 102	22, 27, 28
Art. 103	22, 27, 28
Art. 105	22, 27, 28
Art. 106	22, 27, 28
Art. 111	22, 27, 28
Art. 113	22, 27, 28
Rules of Civil Procedure, Rule 16	3

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No. 267

UNITED STATES OF AMERICA, *Petitioner*

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SEATTLE-FIRST NATIONAL BANK,
a National Banking Association

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT

QUESTION PRESENTED

Does the organization of a national banking association by consolidation under The National Bank Act involve liability for documentary stamp tax under the Internal Revenue Act?

STATEMENT

Respondent, Seattle-First National Bank, is a national banking association organized on December 28, 1935, under Section 34a of The National Bank Act (12 U. S. C. A., § 34a). The constituent banks participating in this consolidation were the Spokane and Eastern Trust Company, of Spokane, Washington (a state bank incorporated under the laws of the State of

Washington), and First National Bank of Seattle (a national banking association organized under The National Bank Act).

The proceedings taken were those required by The National Bank Act, namely; an agreement of consolidation entered into by the directors of the constituent banks participating (R. 25), ratification of this agreement by the stockholders of both banks (R. 38) and the issuance of a certificate of approval by the Comptroller of the Currency (R. 16). No deed, conveyance, assignment or other instrument was executed to transfer to the resulting consolidated association, Seattle-First National Bank, the assets of either of the constituent institutions participating in the consolidation (R. 77-78), The National Bank Act by its terms subjecting the consolidated association to all liabilities of the constituent members and vesting in the consolidated association all assets of the constituent members.

The consolidation agreement (R. 25) was in the form prescribed by the organization division of the Bureau of the Comptroller of the Currency (R. 25), and contained stipulations on the part of both banks as required by Section 34a of The National Bank Act. For example, the agreement of consolidation stipulated for consolidation under the charter of the First National Bank of Seattle, provided for the name of the resulting consolidated association, the location of its main banking house, the amount of its capital, the contribution of assets by each of the constituents to the consolidation, the vesting of these assets in the consolidat-

ed association and the assumption by it of the liabilities of each of the constituents, the allotment of shares and such other matters as The National Bank Act required.

The Collector of Internal Revenue required the payment of documentary stamp tax under Schedules A-3, A-8, A-9, Title VIII of the Revenue Act of 1926, as amended, claiming (R. 19, 21) that as a result of the consolidation the Spokane and Eastern Trust Company was merged into and became a branch of the First National Bank of Seattle (R. 19), as a result of which the assets of the Trust Company became the property "of the continuing corporation, the First National Bank of Seattle" (R. 19). Accordingly, stamps in the amount of the asserted liability were purchased, and there being no conveyance, assignments or other transfers to which stamps might be attached the Deputy Collector affixed them to letters which he wrote to the Spokane and Eastern Branch of the First National Bank of Seattle. Claim for refund having been made and denied this suit was brought to recover the sums paid.

The pleadings consisted of the complaint and the answer of the United States. The court ordered a pretrial conference under Rule 16 of the Rules of Civil Procedure (R. 11) and made findings of fact. At the trial plaintiff introduced evidence of J. L. Campbell, George H. Westerman and C. A. Nicholson, officers of the Bank, and exhibits consisting of the certificate of the Comptroller, minutes of the meetings of the stockholders and directors of the Spokane and Eastern

Trust Company and letters from the Deputy Collector of Internal Revenue with the stamps for the amount of the tax assessed affixed and cancelled by him. The United States offered no testimony (R. 54).

The opinion of the court (R. 55) contains the following factual finding:

> "* * * As a consequence of the consolidation, without the issuance of any deed or other instrument of conveyance as to the real estate and without the execution of any instrument of transfer as to the stocks and bonds and other securities, the title to all of such property became vested in the plaintiff.* * *"

The court concluded that as to the stocks and bonds the reasoning employed by the United States Circuit Court of Appeals for the Ninth Circuit in *United States* v. *Merchants National Trust & Savings Bank*, 101 Fed. (2) 399, applied (R. 71). Secondly, the court concluded that as to the real estate there had been no sale, no conveyance, "no purchaser to whom any lands, tenements or realty were granted, assigned, transferred or otherwise conveyed to or vested in" (R. 72), and accordingly concluded that as to each category the tax had been improperly assessed (R. 75). Findings of fact (R. 76) and judgment (R. 82) were entered in accordance with the court's opinion.

Upon appeal to the United States Circuit Court of Appeals the United States omitted from its designation of the portions of the record the evidence introduced at the trial (R. 85). Accordingly, there is before this court a partial record only. The testimony of the

officers of the Bank introduced by the plaintiff is omitted (R. 54).[1]

ARGUMENT

I. The National Bank Act.

In this case no question of fact is presented for review. The plaintiff did that which the Bank Act prescribed, nothing more. The effect of such a consolidation depends upon a construction of The National Bank Act, its purpose and effect.

The National Bank Act is to be construed by the same principles as any other act of Congress. The comprehensive terms of no act of Congress ought to be restricted by technical refinements or by specious reasoning. Statutes ought to be construed in the light of their purpose. Where that purpose is unmistakable, it should be given effect. They are to be given a reasonable application consistent with their words and with the legislative purpose. *Haggar Co.* v. *Helvering*, 308 U. S. 389, 394.

The conflict between the theory embodied in the state

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[1] An examination of the opinion of the court (R. 55), the findings of fact numbers 5 and 6 (R. 77), will disclose that the court had before it evidence that, as stated by the Circuit Court of Appeals, "no deed, assignment or other instrument was executed to transfer real estate, stocks, bonds, or other property whether held in a fiduciary capacity or owned outright by the bank. The certificates were not endorsed, nor was there any delivery or change of possession other than that which may be implied from the consolidation" (R. 94). We suggest, accordingly that under the universally accepted rule of appellate practice this court will presume that proper evidence to sustain the finding of fact was introduced at the trial. *United States* v. *Winston*, 170 U. S. 522, 525.

bank system and the national banking system has long been familiar to everyone.[2] In the process of time it has become the established policy of Congress to encourage the conversion of state banks into national banking associations. The tragedy of the last depression and bank holiday has strengthened this congressional purpose and gone far to reduce the opposition on the part of the states and state banks. Opposition remains, however.[3]

The present statute (Title 12, U. S. C. A.) is derived from the Act of June 3, 1864. Under the act national banking associations may be formed in one of four ways:

First. An association may be formed under §§ 21 to 28, inclusive of The National Bank Act. The formalities required are that the persons uniting to form the association shall sign articles of association (§ 21, Title 12, U. S. C. A.), and shall execute an organization certificate (§ 22, Title 12, U. S. C. A.), which shall be acknowledged and filed with the Comptroller of the Currency (§ 23, Title 12, U. S. C. A.). Thereupon the Comptroller issues his certificate of authority to com-

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[2]The names of Hamilton, Jefferson, Jackson and Webster and the cases of *McCulloch* v. *Maryland*, 4 Wheat. 315; *First National Bank* v. *Fellows*, 244 U. S. 416; and *Ex parte Worcester Nat'l Bank*, 297 U. S. 347, instantly remind everyone of the wealth of eloquence which has been devoted to the subject in the legislatures, state and national, as well as in the courts.

[3]*Hofheimer* v. *Seaboard Citizens Nat'l Bank*, 154 Va. 392, 153 S. E. 656. See also Congressional Record, Vol. 77, Part 4, p. 3227 et seq., Senators Glass, Costigan and Cousins; p. 3827, Congressmen Steagall and May; and p. 3840, Congressman Patman.

mence banking (§ 27, Title 12, U. S. C. A.).

Second. Under Section 35 a state bank may be converted into a national banking association (§ 35, Title 12, U. S. C. A.). The formalities of organization, in brief, are the affirmative vote of the stockholders to the conversion, execution of articles of association and an organization certificate by the directors and approval by the Comptroller of the Currency.

Third. The Act of November 7, 1918 (§ 33, Title 12, U. S. C. A.), authorizes the consolidation of two or more national banking associations into one association. The required procedure, affirmative vote of shareholders, execution of agreement by directors and approval by the Comptroller does not differ materially from that required for the formation of an association by conversion under Section 35.

Fourth. The Act of February 25, 1927 (§ 34a, Title 12, U. S. C. A.), amended the Act of November 7, 1918, by adding a third section authorizing the consolidation of a state bank with a national banking association. The required procedure, affirmative vote of shareholders, execution of agreement by direct vote of shareholders, execution of agreement by directors and approval by the Comptroller is identical with that required under Section 33.

It thus appears that national banks may be formed under four different acts of Congress and that in each case the procedure is substantially the same. Likewise state banks may be converted into national banking associations under two separate acts of Congress which have now been included in The National Bank Act as

paragraphs 35 and 34a. Also, since 1864 it has been the congressional policy to encourage the organization of national banking associations out of state banks.

Of course, it is apparent that the effect of the destruction of its corporate existence and identity and the interruption of its banking business would be such as to discourage any state bank from changing over into a national banking association by conversion or by consolidation unless provision was made for continuity of corporate existence, banking operations, property rights and liabilities.[4] The necessity for continuity of corporate existence has been recognized by this court in cases of the conversion of a state bank into a national banking association. *Metropolitan Nat'l Bank* v. *Claggett*, 141 U. S. 520.

Through some oversight the Act of November 7, 1918, providing for the consolidation of national banking associations (§§ 33 and 34, Title 12 U. S. C. A.)

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[4]The business of banking is complicated. Practically no individual remains unaffected by even the momentary suspension of their operations. The bank holiday is an example. A large city bank has many millions of deposits. Its saving deposits are evidenced by savings bank books, constituting a contract between the bank and the depositor. It has outstanding negotiable instruments of various kinds, notes, letters of credit, certificates of deposit and in times past currency. If it is authorized to do a trust business it is presumably acting as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in many other fiduciary capacities. If it were necessary for the state bank to resign as trusteee, executor, administrator, guardian, etc., file its accounts with the court having jurisdiction with the attendant publication of notice, hearing, etc., it would be a task beyond undertaking. At the same time the national banking association would have to be reappointed after the formal application, notice, hearing, etc., and qualify according to the requirements of different jurisdictions.

incorporated language which might give rise to the contention that the effect of the consolidation was an absorption by one bank of the others so that the corporate existence of only the one bank continued in the resultant consolidated association.

To correct this oversight the Act of February 25, 1927, § 34a, enacted to provide for the consolidation of a state bank with a national banking association, contained the following language:

> "Upon such a consolidation, or upon a consolidation of two or more national banking associations under section 33 of this title, the corporate existence of *each* of the constituent banks and national banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and the consolidated association shall be deemed to be the same corporation as each of the constituent institutions." (Italics ours)

It likewise provided for the continuity of corporate titles in language to be quoted later.

It is not important whether formation of national banks by what the Bank Act describes as consolidations is in fact a consolidation or a merger of those words are employed in state statutes. Whether the formation of a national banking association is similar to a consolidation or similar to a merger has no bearing upon the question before this court—for what purpose did Congress insert the language employed in prescribing the effect of the formation of a banking association by a consolidation.

The policy of Congress has long been to foster the progressive strengthening of the banking structure of the country by consolidations, and to encouraging the growth of the national banking system through the gradual absorption of state banks; and to simplify the cumbersome procedure incident to the consolidation or merger of corporations under state statutes by limiting the number of documents and steps and formalities required.

In the face of this plain purpose the court is asked to say that Congress intended to eliminate only *some* of the formalities, documents and steps incident to the normal transfer of legal title to property but not all. Documentary stamp taxes are not the least of the formalities incident to the transfer of property. It is to be remembered that most of the states have excise tax laws similar to the documentary stamp tax laws of the Internal Revenue Act. Presumably, also, the various municipal and quasi-municipal entities within a state having power to levy excise taxes would gladly impose them upon one of the giant national banking associations formed by consolidation if that involves taxable incidents.

We suggest that some confusion is occasioned by the failure to keep distinct the entities involved in the consolidation in this case. The agreement of consolidation was made between the Spokane and Eastern Trust Company of Spokane, Washington, a bank organized

under the laws of the State of Washington, and the First National Bank of Seattle, a national banking association formed under The National Bank Act. Respondent here, Seattle-First National Bank, a national banking association was organized on December 28, 1935, by consolidation of the two foregoing entities. Of course, the Spokane and Eastern Trust Company had stockholders, officers and directors, as did the First National Bank of Seattle, and so has the respondent, Seattle-First National Bank.

At no time were the assets of the Spokane and Eastern Trust Company or the First National Bank of Seattle vested in their respective stockholders. They (stockholders) did not own them and could not convey them. If it could be said that the stockholders of the two banks owned the assets and could convey legal title to them, to whom is it claimed that they conveyed them? At page 10 and page 19 of the Government's brief it is claimed apparently that the agreement of consolidation was a conveyance by the stockholders of the Spokane and Eastern Trust Company to respondent. It is even stated at page 10 that the agreement of consolidation effected a transfer of title to the securities held by the state bank as a fiduciary. Why is it permissible to disregard the corporate entity of the two constituent banks and claim that their assets are owned by their stockholders and yet insist upon the corporate entity of the resulting consolidated association. If we disregard the corporate entity all around, since the shareholders are the same, the

Government is in the position of claiming that the stockholders of the Spokane and Eastern Trust Company and the First National Bank of Seattle have sold and transferred to themselves as stockholders of the Seattle-First National Bank the same assets. As pointed out at page 19 of the Government's brief they have been paid full value for these assets, yet they still own them. A remarkable feat of financial legerdemain.

Nor can we refrain from noting that at page 10 of the Government's brief it is claimed that the consolidation agreement is a transfer of legal title to securities held by Spokane and Eastern Trust Company in its various fiduciary capacities. For instance, the Spokane and Eastern Trust Company, let us say, was executor under the will of John Jones, deceased, and as such held legal title to certain bonds. As a result of the consolidation the Seattle-First National Bank is now the executor under the will of John Jones, deceased, and holds the legal title to these same bonds. Is it the Government's position that the stockholders of the Spokane and Eastern Trust Company by the consolidation agreement sold or conveyed the legal title to these bonds?

Of course, national banks do purchase the assets of other banks, either state or national, and pay for them. See, for example, *Dixon* v. *Cannon*, 32 Fed. Sup. 626; 115 F. (2) 913.

Likewise, national banks on occasion pledge their assets or loan money upon the security of a pledge of

another bank's assets. *Hightower* v. *American Nat'l Bank*, 263 U. S. 351.

Likewise, national banks enter upon other plans for the acquisition or disposition of assets. *Adams* v. *Nagle*, 303 U. S. 532.

None of these or similar transactions are a consolidation as prescribed by The National Bank Act. The Seattle-First National Bank, a national banking association, was formed by consolidation under Section 34a of The National Bank Act. It did not buy its assets from the Spokane and Eastern Trust Company, or its stockholders, nor from the First National Bank of Seattle, or its stockholders, nor from any combination of the four.

II. Documentary Stamp Taxes Under the Revenue Act of 1926, As Amended.

The present act is identical in language with previous acts, except that Congress from time to time has added or eliminated from the subjects enumerated in Schedule A. It is noteworthy, however, that when sales or transfers of stock, sales or transfers of bonds and deeds of conveyance of land have been added or eliminated from Schedule A, the language employed has been the same as that in previous acts.

The language of Section 800 is "* * * there shall be levied, * * * in respect of the several bonds, debentures, or certificates of stock and of indebtedness, and other documents, instruments, matters and things mentioned in Schedule A of this title, * * *" In other

words, the Act levies an excise tax on certain named and described things or transactions.

Turning to Schedule A-3, the thing or transaction upon which the excise tax is levied is "Capital Stock, Sales or Transfers." A-8. "Conveyances." A-9. "Bonds, etc., Sales or Transfers." Under 3 the excise is on a *sale* or *transfer* of *legal title;* under 9 upon *sales* or *transfers* of *legal title* * * * (bonds, etc.); under 8 upon conveyances (deed, etc.) by which land which has been sold is conveyed. In all three cases a sale is required and in all three a transfer of legal title is required. In one, namely, 8, the levy is upon the instrument, not upon the sale and not upon the land. There must be a sale, transfer or delivery of legal title from one person or entity to another before the tax attaches.

In *Reybestos-Manhattan Co.* v. *U. S.*, 296 U. S. 60, 62, this court had occasion to consider this excise tax. The court held that the transfer of the right to receive shares was equivalent to the transfer of the shares themselves. Speaking of the Act the court said:

> "* * * Its language discloses the general purpose to tax every transaction whereby the right to be or become a shareholder of a corporation or to receive any certificate of any interest in its property is surrendered by one and vested in another * * *."

and again:

> "* * * It is enough if the right or interest transferred is, by any form of procedure, relinquished by one and vested in another * * *"

and further (p. 63):

"* * * It is relinquishment of the ownership for the benefit of another, and the resultant acquisition of it by him which calls the statute into operation."

In the language of the Bank Act respondent is "deemed to be the same corporation" as the Spokane and Eastern Trust Company whose corporate existence is "continued in" respondent. The Spokane and Eastern Trust Company has not sold or parted with ownership. On the contrary, it has retained it. It has remained the same body corporate with the same stockholders, the same officers, banking quarters, assets and liabilities, but has assumed a new name and operates under a changed jurisdiction. There has been "no relinquishment of the ownership" by the Spokane and Eastern Trust Company "for the benefit of" the respondent. Nor has there been "the resultant acquisition of it" by respondent "which calls the statute into operation."

III. Regulations 71, Relating to Stamp Taxes Under Title VIII of the Revenue Act of 1926, as Amended.

The Commissioner of Internal Revenue has promulgated regulations for the enforcement of Title VIII of the Revenue Act. We will refer to several articles in these regulations. It will be convenient, however, to segregate consideration of the regulations into two parts, the first being those prescribed under Schedules A-3 and A-9 for the sales and transfers of stocks and bonds (the regulations covering such transactions being identical), the second being those prescribed for

the conveyance of real estate under Schedule A-8.

First. The applicable regulations are:

Chapter III of Regulations 71 (revised July 1932). The regulations follow the language of the statute by using the words "Sales and Transfers" as the subject matter with which the regulations deal. They do not purport to deal with matters which are neither sales nor transfers unless some similarity of form or substance requires a particular transaction to be specially considered. Thus, Article 31, "Basis of Tax," commences as follows: "Sales or transfers of stock." Article 34. "Sales or transfers subject to the tax." Article 35. "Sales or transfers not subject to tax." Article 36. "Memoranda of sales." Article 37. "Records of sales or transfers of stock." Article 38. "Returns by persons making sales." The Collector of Internal Revenue did not attempt by the regulations to extend the scope of the Act to transactions beyond the language of the Act.

The regulations attempt definition of the scope of the Act by illustration. The examples given do not purport to be all inclusive. They do not exclude other transactions. On the contrary, it is implied that similar transactions to those given as examples would in like manner be included or excluded.[5] Thus, Article

[5] In *State Bank Farmers Trust Company* v. *Hoey*, 125 Fed. (2), 575, the court failed to notice the fact that the 1932 edition of Regulations 71 attempts to define the scope of the Act by giving examples, thus clearly indicating that it was intended that other transactions of a like kind would be treated in the same manner.

34 gives *examples* of transactions subject to the tax and Article 35 gives *examples* of transactions not subject to the tax. Subparagraph (m) of Article 35 gives as an example the mere delivery of a certificate by or on behalf of a customer to his broker for the purpose of sale. Art. 35 (n) gives as another example the mere delivery of a certificate of stock from a broker to his customer. Certificates of the fact and other formalities are required. Delivery by the customer to his messenger for delivery to the broker would not be a taxable sale or transfer, even though not given as an example in the regulations. Also a delivery to one's secretary, cashier, or office manager, would not be subject to tax, even though not mentioned as examples in the regulations. In short, to say that the regulations were intended to be or are an all inclusive definition of transactions subject or not subject to the tax leads to an immediate absurdity.

Art. 35 of the Regulations:

> "Article 35. Sales or transfers not subject to tax.—The following are examples of transactions not subject to the tax * * *
>
> "(r) Transfers of shares or certificates of stock which result wholly by operation of law are not subject to the tax. Transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor."

Even though it should be held that a consolidation necessarily involves a sale and a transfer of the stocks and bonds of the constituent banks to the resulting consolidated association, it is a transfer solely by opera-

tion of law. It is scarcely possible to conceive of a more perfect example of a transfer by operation of law than that given by the Bank Act.

> "* * * All the rights, franchises and interests of each of such constituent banks * * * in and to every species of property, * * * shall be deemed to be transferred to and vested in such consolidated national banking association without any deed or other transfer; * * *".
>
> "* * * and such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests, * * *"

We note the argument that the consolidation agreement was executed by the directors of the constituent banks participating in the consolidation and that this was required by the Bank Act and that, therefore, Section 34a of the National Bank Act requires the affirmative act of the directors and stockholders of each of the constituent institutions and therefore the transfer is not wholly by operation of law. The argument might also have included the fact that the Bank Act requires the affirmative act of the Comptroller of the Currency. No one step in a consolidation would affect a transfer of assets. *Adams* v. *Nagle*, 303 U. S. 532. The consolidation agreement, when executed by the officers and directors of the constituent banks, did not transfer assets even when ratified by the stockholders. Every act which either of the constituent banks, their officers, directors and stockholders, could or did do would be wholly insufficient to create the

Seattle-First National Bank or vest the assets of either of the constituent banks in it. *Adams* v. *Nagle*, 303 U. S. 532.

Obviously, a consolidation is one thing; transfer (if it be a transfer) of assets pursuant to it is another and a different thing. Just as death, marriage, divorce, insolvency, etc., are one thing and the devolution of property pursuant thereto another. Marriage, divorce or insolvency require affirmative acts of the parties. They may or may not have as their result a transfer of legal title to property but that transfer is not by the affirmative act of the parties but is wholly by operation of law. The assets of the constituent banks participating in a consolidation vest in the resulting national banking association, but they vest pursuant to the consolidation, in the language of the Bank Act, "by virtue of such consolidation."

We turn to Article 35 (h):

> "Article 35. Sales or transfers not subject to tax.—The following are examples of transactions not subject to tax: * * *
>
> "(h) The transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

This article is applicable to the stocks and bonds held in fiduciary capacities by the Spokane and Eastern Trust Company.

A trust is an entity in and of itself. It is not destroyed, changed nor its efficacy in anywise impaired

by a change in the person who is trustee. If a trustee dies, resigns, or is removed because of incapacity or other reasons, the trust has not thereby failed. It is submitted that if the trust as an entity sells and conveys bonds to another trust or to another entity, then there is, in the language of this Court "a relinquishment of the ownership" by one entity for "the benefit of another" entity and there is "the resultant acquisition" of that ownership by the second entity. But when a trustee dies, resigns or is otherwise removed from his office and a new trustee is appointed, then there has been no relinquishment of ownership of the assets of the trust by the trust for the benefit of any other entity and no resultant acquisition of the ownership of the assets by any other entity. In the words of the statute and of the regulations, there has not been a sale nor a transfer.

The regulations recognize this. Congress also recognized the point in the Revenue Act of 1942, c. 619, 56 Stat. 957.

We note the fact that in two cases, *City Bank Farmers Trust Co.* v. *Hoey*, 125 Fed. (2d) 577), and *State Street Trust Company* v. *Hassett*, 134 Fed. (2d) 156, it has been held that assets held in trust by one of the parties to a statutory merger under the Massachusetts or New York statutes pass by a transfer which is not within the scope of Article 35 (h). However, it is respectfully submitted that these decisions overlook the legal attributes of a trust and the relation of a trustee to it, and in attempting to disregard the tech-

nical legal relationships of a trustee to the trust and its assets and beneficiaries have misapplied the decision of this court in *Raybestos-Manhattan Co.* v. *U. S.*, 296 U. S. 60.

Whether or not we are correct in this criticism of these decisions, and whether or not there were in fact actual taxable transfers in each of these cases, and whether or not apart from the mere fact of entering into a merger there were strictly technical transfers of trust assets by assignment of stocks, surrender and re-issue of new certificates as suggested in our brief in opposition to certiorari, none the less these cases cannot be applied to a consolidation under The National Bank Act, where

> "* * * such consolidated national banking association, by virtue of such consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy the same * * * appointments, * * * as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, committee of estates of lunatics and in every other fiduciary capacity, in the same manner and to the same extent as such rights, franchises, and interests were held or enjoyed by any such constituent institution at the time of such consolidation."

Second. Real Estate.

The language of Schedule A-8, abbreviated, follows:

> "8. Conveyances: Deed, instrument, or writing, delivered * * *, whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to or vested in, the purchaser or purchasers * * *"

A levy under this Schedule is upon a conveyance but not upon all conveyances. The levy is upon only those conveyances whereby lands are granted. It is further limited to conveyances granting lands which have been sold; and further limited to conveyances which vest title in the purchaser. Under the terms of the Act, then, there must be a deed, which is a technical instrument of conveyance effective under state law to convey land which has been sold to the purchaser.

The regulations interpreting this Schedule emphasize this interpretation. The regulations are contained in Chapter 8 of Regulations 71 (1932 ed.) commencing at page 38. The regulations are too numerous to be set out in full and we have accordingly printed them in an appendix. In general they contemplate a grantor and a grantee; a technical deed; a technical sale; a valuable consideration; and a technical vesting of title.[6]

As noted previously the Internal Revenue statutes have contained a provision for a documentary stamp tax for many years. The documentary stamp tax on conveyances was included in the War Revenue Act of 1917 (Act of October 3, 1917; 40 Stat. 319) as Schedule A-7. The same language was included in the Revenue Act of 1918 (Act of February 24, 1919; 40 Stat. 1057) as Schedule A-7. The present Act is in language identical.

The regulations applicable to conveyances of real

[6]See Articles 75, 79, 84, 91, 92, 100, 101, 102, 103, 105, 106, 111 and 113.

estate have likewise been promulgated for a long time. Regulations 55, as revised October 1920; Regulations 55, as revised July 3, 1924, etc., are for present purposes identical with Regulations 71, as revised July 1932. It is suggested that the enactment, re-enactment and final codification of the statute while the regulations were in effect should be treated as approving their interpretation of the scope of the statute. *Helvering* v. *Wilshire Oil Co.*, 308 U. S. 90, 100; *Helvering* v. *Reynolds Tobacco Co.*, 306 U. S. 110, 115; and *National Lead Co.* v. *U. S.*, 252 U. S. 140.

We turn to the situation in this case. No deed or any other instrument of conveyance has been executed by any one.[7] The directors of the Spokane and Eastern Trust Company of Spokane and The First National Bank of Seattle signed an agreement for consolidation and the stockholders ratified it. The Government's position is that such an instrument may be construed to be a conveyance. It does not purport to be a conveyance. It is merely an agreement to consolidate in the future. It is not self-executing; it does not operate to transfer title. The consolidation agreement was an agreement to consolidate, nothing else. In the statutory words it was not a "deed," it was not "delivered," it did not "grant."

For the sake of the argument, however, let us con-

[7]The banking quarters occupied by the Spokane and Eastern Trust Company are now occupied by the Seattle-First National Bank. No deed or other instrument of conveyance has been executed or delivered. The Collector of Internal Revenue affixed the stamps to a letter which he wrote. (R. 19).

sider the consolidation agreement to be a deed. The parties to it are the Spokane and Eastern Trust Company of Spokane and the First National Bank of Seattle. Presumably, then, the Spokane and Eastern Trust Company, a corporation, is the grantor, and the First National Bank of Seattle, a national banking association, is the grantee. Presumably, also, the instrument in and of itself operates when delivered to divest the grantor of title to real property and vests it in the grantee. The difficulty with this is that the title to the banking quarters never vested in the First National Bank of Seattle. Under the terms of the Bank Act the title is not transferred from one constituent to the consolidation to another constituent but vests in the resultant consolidated association, namely, the Seattle-First National Bank.

A second difficulty is that the title now vested in the Seattle-First National Bank did not vest in it by means of the consolidation agreement (only one step in the consolidation) but by virtue of the consolidation as a whole and the operation thereon of the terms of The National Bank Act.

But it is said that the banking quarters were sold to a purchaser upon a valuable consideration because stock in a corporation is a valuable consideration. We have already remarked upon the confusion resulting from such an argument. The legal title to the banking quarters of the Spokane and Eastern Trust Company was never in the stockholders of that institution. It was in the corporation. How, then, could the stock-

holders sell it, and to whom did they sell it, and for what price? The answer is that they did not. The corporation of which they were stockholders changed its name and the jurisdiction to which it was subject, becoming a national bank. If this be a sale, so is conversion of a state bank into a national bank and so is every change of name.

There was an absence of every element necessary to the levy of an excise tax under Schedule A-8—deed, sale, grantor, grantee, transfer, consideration.

The case of *Carpenter* v. *White*, 80 Fed. (2) 145, is cited as applicable. It involved a transfer of real estate by deeds of two corporations in a non-statutory merger. There having been deeds of conveyance the only question was whether there was a consideration. This is too remote to be of any value.

IV. Cases Cited.

We have discussed in the course of this brief such of the cases cited in the Government's brief as seem to have some bearing upon the question considered. There are one or two cases, however, that have not been touched upon.

The case of *Koppers Coal & Transportation Co.* v. *United States*, 107 Fed. (2) 706, was a merger under the laws of Delaware, which contained no provision for the automatic transfer of property. Accordingly, one of the constituents to the merger endorsed and delivered to the transfer agent stock which it held as an

asset for registration in the name of the resultant corporation.

The cases of *State Street Trust Co.* v. *Hassett*, 134 Fed. (2) 156, and *City Bank Farmers Trust Co.* v. *Hoey*, 125 Fed. (2) 577, have been discussed in the preceding pages and in our brief opposing granting of certiorari in this case. We there pointed out that neither of these cases touch upon the question of a conveyance of real estate under Schedule A-8 nor upon the question of a sale or transfer of owned assets.

We have not discussed the case of *United States* v. *Merchants Nat'l Trust & Savings Bank*, 101 Fed. (2) 399, nor the opinions of the District Court or the Circuit Court of Appeals in the present case. They speak for themselves. Respectfully we submit that the reasoning of the Circuit Court of Appeals for the Ninth Circuit construing the statute in the light of Article 35 (h) of Regulations 71 and Article 35 (r) of the same regulations is correct.

V. Conclusion.

It is respectfully submitted that this case has been rightly decided by the courts below and accordingly should be affirmed.

Respectfully submitted,

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TREASURY REGULATIONS 71

(1932 ed.)

DEEDS OF CONVEYANCE

ART. 75. *Who shall affix stamps.*—The Act requires that the person who makes, signs, or issues any instrument taxable thereunder shall affix and cancel the revenue stamps. It also prohibits any person from accepting such instruments unless they are properly stamped.

ART. 79. *"Sold" defined.*—The term "sold" imports the transfer of the absolute or general title for a valuable consideration or price.

ART. 84. *What constitutes real property determinable by law of State where located.*—(a) What constitutes "lands, tenements, or other realty" is determinable by the law of the State in which the property is situated. Standing timber is ordinarily held to be real estate, and where so held the deed transferring it is subject to the tax.

(b) In States where common-law dower still exists an instrument purporting to convey the inchoate right of dower of a wife or the consummate right of dower of a widow, prior to assignment of dower, is not subject to stamp tax; but an instrument conveying the estate acquired by a widow upon assignment of dower is subject to tax. Where by statute dower has been abolished and a different interest in the husband's real property conferred upon the wife in lieu thereof, the taxability of an instrument purporting to convey such an interest prior to its assignment will be determined by the nature of the wife's interest, and the statutes and decisions of the particular State in which the real estate is located must be consulted.

ART. 91. *Options and contracts for real estate.*—No tax is imposed upon an option for the purchase of real property or upon a contract for the sale of real estate.

ART. 92. *Deeds of release and deeds of trust.*—Deeds of release and deeds of trust are not subject to tax.

ART. 100. *Deeds from agent to principal.* — Deeds from an agent to his principal conveying real estate purchased for and with funds of the principal are not taxable.

ART. 101. *Reconveyances of partnership by receivers.*—Conveyances of property of a copartnership, in the hands of receivers, back to the owners after administration of the estate are not taxable.

ART. 102. *Partition deeds.*—Partition deeds are not subject to tax unless a consideration passes between the parties by reason of one or more of them taking under the division a share of real estate of greater value than his undivided interest, in which event stamp tax attaches to the deeds conveying such greater shares, calculated upon the value of such consideration.

ART. 103. *Conveyances without consideration.*—Conveyances of realty, not in connection with a sale, to trustees or other persons without consideration are not taxable.

ART. 105. *Deeds confirming title.*—Deeds that are simply confirmatory and do not vest title not already vested are exempt from tax.

ART. 106. *Contracts for sale of real property.*—Contracts for the sale of real property are not taxable unless they vest title.

ART. 111. *Conveyance by corporation to owner of all the capital stock.*—A conveyance of real estate by a corporation without valuable consideration to an owner of all its capital stock in consequence of its dissolution is not subject to tax.

ART. 113. *Conveyances to trustee, or from trustee to cestui que trust, without consideration.*—Conveyances to a trustee without valuable consideration or from a trustee to a cestui que trust without valuable consideration are not subject to tax.

SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1943.

United States of America, Petitioner, *vs.* Seattle-First National Bank, a National Banking Association.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[March 27, 1944.]

Mr. Justice Murphy delivered the opinion of the Court.

Respondent initiated this suit to recover the amount of the documentary stamp tax, penalty and interest which had been exacted under the Revenue Act of 1926, as amended, in connection with a statutory consolidation of banks under Section 3 of the National Banking Act.[1] The District Court entered judgment for respondent for the amount of the tax and interest, 44 F. Supp. 603.[2] The Circuit Court of Appeals held that the case was governed by one of its former decisions[3] and affirmed the judgment, 136 F. 2d 676. We granted certiorari, 320 U. S. 723, because this judgment was alleged to conflict with decisions in other circuits[4] and because of the desirability of a final settlement of the problems involved.

In 1935 the directors of the Spokane and Eastern Trust Company, a state bank, entered into a written agreement of consolidation with the directors of the First National Bank of Seattle. The agreement provided that the banks were to be consolidated under the charter of the First National Bank of Seattle and under the new corporate title of Seattle-First National Bank, the respondent herein. The agreement was ratified and confirmed by

[1] Act of November 7, 1918, c. 209, 40 Stat. 1043, Sec. 3, as added by the Act of February 25, 1927, c. 191, 44 Stat. 1224, Sec. 1, and as amended by the Banking Act of 1933, c. 89, 48 Stat. 162, Sec. 24, and the Banking Act of 1935, c. 614, 49 Stat. 684, Sec. 331; 12 U. S. C. § 34a.

[2] Recovery was denied for the $100 penalty, which was paid in compromise of a threatened criminal prosecution, on the ground that the compromise was a final settlement of the penalty. This matter is not now before us.

[3] United States v. Merchants National Trust & Savings Bank, 101 F. 2d 399.

[4] See City Bank Farmers Trust Co. v. Hoey, 125 F. 2d 577; State Street Trust Co. v. Hassett, 134 F. 2d 156.

the requisite number of stockholders of both banks and the Comptroller of the Currency issued the necessary certificate of approval, reciting that the directors and shareholders of both banks had complied with the provisions of the National Banking Act.

The state bank owned real estate, including its banking premises, as well as corporate stocks and bonds, to all of which it held legal and beneficial title as part of its corporate assets. It also held in trust certain stocks and bonds, the legal title to which was vested in it as trustee, executor, administrator, guardian, or in other fiduciary capacities. Section 5 of the consolidation agreement provided that "All assets of each association at the date of consolidation shall pass to and vest in the consolidated association, and the consolidated association shall be responsible for all of the liabilities of every kind and description of each of the consolidating associations."

The transfer to respondent of title to this property held by the state bank was not evidenced by any deed, conveyance, assignment or other instrument. Nor were any documentary stamps purchased or affixed with respect to such transfer. Subsequently, a deputy collector examined the bank records and exacted a tax from respondent on the theory that the consolidation had resulted in a taxable transfer. The necessary stamps were purchased and affixed and this suit for refund followed.

First. We conclude that, as to the securities to which the state bank held both legal and beneficial title, there was no taxable transfer under the stamp tax provisions in effect at the time the consolidation took place.

Section 800, Schedule A-3, of the Revenue Act of 1926, as amended,[5] imposes a stamp tax on transfers of legal title to any shares of stock or certificates, "whether made upon or shown by the books of the corporation or other organization, or by any assignment in blank, or by any delivery, or by any paper or agreement or memorandum or other evidence of transfer or sale (whether entitling the holder in any manner to the benefit of such share, certificate . . . or not)." Schedule A-9[6] imposes a

[5] C. 27, 44 Stat. 9, as amended by Section 723(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169.

[6] C. 27, 44 Stat. 9, as added by Section 724(a) of the Revenue Act of 1932, c. 209, 47 Stat. 169, and as amended by Section 212 of the National Industrial Recovery Act, c. 90, 48 Stat. 195, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431.

stamp tax on similar transfers of legal title to bonds.

Standing alone, these statutory provisions make no exceptions and clearly impose a tax on the transfer of title to the securities legally and beneficially owned by the state bank. But administrative regulations, which until recently have been left undisturbed by subsequently enacted legislation and are to be respected as settled administrative practice,[7] have carved out certain exemptions germane to the transfer here involved. Thus Article 34(r) of Treasury Regulations 71 (1932 ed.) provides that the transfer of stock owned by a corporation which is merged into another corporation is subject to the stamp tax, "such a transfer being effected by the act of the parties and not wholly by operation of law."[8] Article 56(r) specifically exempts from the tax those transfers of shares or certificates of stock "which result wholly by operation of law"; it further states that "transfers of this character are those which the law itself will effect without any voluntary act of the parties, such as transfer of stock from decedent to executor." Article 120 makes these same provisions applicable to sales or transfers of bonds. The problem thus resolves itself into a determination of whether the transfer of the state bank's securities to respondent occurred "wholly by operation of law" so as to exempt the transfer from the stamp tax requirements.

It is clear that the consolidation or merger of the national bank and the state bank occurred through the voluntary acts of the respective directors and stockholders pursuant to the provisions of Section 3 of the National Banking Act, with the approval of the Comptroller of the Currency. If the words "wholly by operation of law," as used in the administrative regulations, refer here to the entire process of consolidation, of which the transfer of securities is an essential part, the exemption cannot be applied. But in a broad sense, few if any transfers ever take place "wholly by operation of law" for every transfer must necessarily be a part of a chain of human events, rarely if ever other than voluntary

[7] Substantially similar regulations were promulgated under the Revenue Act of 1926 and were in effect when Congress, in the Revenue Act of 1932, reenacted the stamp tax provisions in issue. Congress did not see fit to amend or change these regulations until the Revenue Act of 1942, Sections 506(b)(1) and (2), c. 619, 56 Stat. 958. See Helvering v. Reynolds Tobacco Co., 306 U. S. 110, 115.

[8] While the grammatical construction of the quoted clause gives rise to some doubt as to its meaning, we interpret it in accord with Article 35(r) so as to impose a tax on transfers arising out of mergers only if the transfer occurs by the act of the parties and not wholly by operation of law.

in character. Thus to give any real substance to the exemption, we must take a more narrow view and examine the transfer apart from its general background. We must look only to the immediate mechanism by which the transfer is made effective. If that mechanism is entirely statutory, effecting an automatic transfer without any voluntary action by the parties, then the transfer may truly be said to be "wholly by operation of law."

Here the actual transfer to respondent of the legal and beneficial title to the securities owned by the state bank was not effected by or dependent on any of the voluntary acts relating to the consolidation agreement or the ratification or approval thereof. Nor was any voluntary deed, conveyance, assignment or other instrument utilized. Rather the transfer occurred solely and automatically by virtue of Section 3 of the National Banking Act. This provides in pertinent part that: (1) upon consolidation, the corporate existence of each of the constituent banks shall be merged and continued in the consolidated national banking association, which shall be deemed to be the same corporation as the constituent banks; (2) all the rights, franchises and interests of each constituent bank in and to every species of property, real, personal and mixed, and choses in action thereto belonging, "shall be deemed to be transferred to and vested in" the consolidated association without any deed or other transfer; (3) the consolidated association, by virtue of such consolidation and without any order or other action by any court or otherwise, shall hold and enjoy the same and all rights of property, franchises and interests (including fiduciary interests) in the same manner and to the same extent as held and enjoyed by the constituent banks.

Thus it is the National Banking Act that is the mechanism by which the transfer of securities is made effective. No voluntary act by the parties is necessary. It follows that the transfer occurred "wholly by operation of law." The mere fact that the parties here saw fit to include in their consolidation agreement a provision that all assets of each constituent bank "shall pass to and vest in the consolidated association" does not make the transfer any less than one "wholly by operation of law." This was merely an agreement that the assets would be transferred in the future and did not purport to be a present, effective conveyance. The transfer of the securities to which the state bank held legal

and beneficial title was therefore exempt from the stamp tax under Articles 34(r) and 35(r).

Second. We reach the same conclusion as to the transfer of securities to which the state bank held legal title in trust in various fiduciary capacities. The intent to tax such transfers must be clear and unmistakable. No such intent is apparent here. Under Section 3 of the National Banking Act, these securities passed to respondent "wholly by operation of law" just as did the securities previously discussed. Articles 34(r) and 35(r) make no distinction between transfers of stocks from a fiduciary and transfers from one who is also the beneficial owner. The exemption therein contained is therefore applicable.[9]

Third. The transfer of the real property owned by the state bank is likewise, in our opinion, exempt from the stamp tax.

Section 800, Schedule A-8, of the Revenue Act of 1926, as amended,[10] places a stamp tax on "Conveyances: Deed, instrument, or writing, delivered . . . whereby any lands, tenements, or other realty sold shall be granted, assigned, transferred, or otherwise conveyed to, or vested in, the purchaser or purchasers . . . " It is clear, however, from Section 3 of the National Banking Act that the state bank's realty was not conveyed to or vested in respondent by means of any deed, instrument or writing. There was a complete absence of any of the formal instruments or writings upon which the stamp tax is laid. Nor can the realty be said to have been "sold" or vested in a "purchaser or purchasers" within the ordinary meanings of those terms. Only by straining the realities of the statutory consolidation process can respondent be said to have "bought" or "purchased" the real property. That we are unable to do.

The judgment of the court below is therefore

Affirmed.

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[9] Because of the clear applicability of Articles 34(r) and 35(r), we have no occasion to determine the applicability here of Article 35(h), which exempts from the stamp tax "the transfer of stock from the name of a deceased or resigned trustee to the name of a substituted trustee appointed in accordance with the terms of the original trust agreement, which is a transfer resulting wholly by operation of law."

[10] C. 27, 44 Stat. 9, as added by Section 25 of the Revenue Act of 1932, and as amended by Section 212 of the National Industrial Recovery Act, and as amended by Pub. Res. No. 36, c. 333, 49 Stat. 431.